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THE NEW REQUIREMENT OF ENFORCEMENT RELIANCE IN COMMERCIAL PROMISSORY ESTOPPEL: SECTION 90 AS CATCH-22

SIDNEY W. DELONG*

Any comprehensive examination of recent appellate court decisions will disclose that the legal doctrine of promissory estoppel has not become a significant source of commercial contractual obligation. Although commercial promissory estoppel claims are often made, plaintiff victories are very rare. These results are difficult to reconcile with frequent scholarly contentions to the effect that contemporary courts have become more receptive to claims of promissory estoppel and have liberalized its doctrinal requirements. More important, the promisor behavior that is incidentally disclosed in reported opinions also undermines academic arguments that rules providing for promissory estoppel have commercial utility. The decisions suggest that most commercial actors consider promissory estoppel liability as a risk to be avoided rather than as a valuable opportunity to create contract obligations, and that they make efforts to avoid it whenever possible. Indeed, a review of recent decisions shows that judicial sympathy toward these efforts to avoid liability has begun to alter promissory estoppel doctrine. In several jurisdictions a commercial promisee must now demonstrate what can be called "enforcement reliance"—reliance on a reasonable belief in the legal enforceability of the promise—in addition to mere "performance reliance"—reliance on a reasonable belief that the promise will be performed. These decisions require that the promisor not only make a reliance-inducing promise, but also clearly express an intention to be legally bound. This article argues that the new requirement is an appropriate default rule for non-bargain, commercial promises because it gives effect to the parties' most probable motives and intentions concerning enforcement.

I. INTRODUCTION

This is a story about a revolution that wasn't. Section 90 of the *Restatement of Contracts* was the first formal expression of promissory estoppel as a contract doctrine of general application.¹ Although the

* Associate Professor of Law, Seattle University School of Law. J.D., Yale Law School 1974; A.B., Vanderbilt University, 1969.

1. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT OF CONTRACTS § 90 (1932) [hereinafter FIRST RESTATEMENT]. The text of Section 90 does not use the term "promissory estoppel" although commentary in the Second Restatement acknowledges its use. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (1979) [hereinafter SECOND RESTATEMENT].

To many analysts, promissory estoppel appeared innovative in contrast to the bargain principle of consideration, which developed in the late nineteenth and early twentieth centuries and was expressed in Section 75 of the First Restatement (now Section 71). See, e.g., GRANT GILMORE, THE DEATH OF CONTRACT 58-66 (1974) [hereinafter GILMORE, DEATH OF CONTRACT]. Corbin and others, however, believed reliance-based

Restatement formulation was derived primarily from cases involving family or charitable gift promises,² courts soon began applying the generalized language of Section 90 to commercial promises. In the ensuing years, it was widely expected that promissory estoppel would revolutionize commercial contract law by erasing the familiar demarcations between enforceable and unenforceable promises that had been drawn by the bargain theory of consideration and by introducing the uncertainty of a new form of reliance-based, tort liability into contract negotiations and relationships.³ These predictions, however, failed to

obligation to be a consideration doctrine of more ancient lineage than the bargain principle. See, e.g., ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 194-195 (1952); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 345 (1969) [hereinafter Henderson, *Promissory Estoppel*]; see also sources cited *infra* note 56.

2. See Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 680 (1984) [hereinafter Feinman, *Promissory Estoppel and Judicial Method*]. Most of the cases relied upon by the drafters of the Restatement involved family gift promises or charitable subscriptions, though a handful involved gratuitous bailments or promises to insure in commercial settings. See FIRST RESTATEMENT, *supra* note 1, § 90 illus. 1-4; *Discussion of the Tentative Draft, Contracts Restatement No. 2*, 4 A.L.I. PROC. APPENDIX 61, 88-111 (1926) [hereinafter PROCEEDINGS] (reporting drafters' discussion of Section 88, which later became Section 90). The Second Restatement drafters discussed numerous hypotheticals, including an uncle's promise to give his nephew Johnny \$1,000, *id.* at 88-93, 95-96, 99, 101-05, 110-11; a promise to pay money if the donee would complete college, *id.* at 87, 109; an uncle's promise to pay his nephew's expenses for a trip to Europe, *id.* at 88; and a promise to make a gift of Blackacre to Johnny, who builds improvements on it, *id.* at 99, 104. The discussion also alluded to the family gift cases of *Kirksey v. Kirksey*, 8 Ala. 131 (1845) and *DeCicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917). PROCEEDINGS, *supra*, at 104-05. The application of Section 90 to commercial promises was probably unanticipated. See GILMORE, *DEATH OF CONTRACT*, *supra* note 1, at 66. By the time of the Second Restatement, however, the comments and illustrations to Section 90 acknowledged its application to commercial promises. SECOND RESTATEMENT, *supra* note 1, § 90 cmts. b & e; Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263, 1266 (1994) [hereinafter Pham, *Waning*].

3. E.g., GILMORE, *DEATH OF CONTRACT*, *supra* note 1, at 87-91; Warren A. Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951) [hereinafter Seavey, *Reliance Upon Gratuitous Promises*]; Warren L. Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 944 (1937) [hereinafter Shattuck, *Gratuitous Promises*]; Note, *Contracts—Promissory Estoppel*, 20 VA. L. REV. 214 (1933) [hereinafter Note, *Contracts—Promissory Estoppel*]; cf. Henderson, *Promissory Estoppel*, *supra* note 1, at 358-60 (arguing that application of promissory estoppel in the commercial context will shape the evolution of the bargain and assent principles of contract law); Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981) ("[T]he principle of [S]ection 90 . . . has become perhaps the most radical and expansive development of this century in the law of promissory liability.").

make allowance for a widespread defensive reaction to the doctrinal novelty.⁴ Once commercial actors became aware of Section 90, they responded by implementing legal strategies designed to reduce or eliminate the new risk of promissory liability. Judicial receptivity to this adaptive response has now begun to reshape promissory estoppel doctrine.

This Article reports on the current state of the co-evolution of legal strategy and legal doctrine by analyzing how Section 90 is being interpreted in the courts.⁵ For several years now, well-counseled commercial promisors have known how to take legally effective measures to avoid Section 90 liability during the negotiation and performance of contracts.⁶ More recently, courts in several jurisdictions have begun to modify the reliance element of promissory estoppel so as to require the promisee to demonstrate a reasonable and foreseeable belief that the promise in question was legally enforceable.⁷ As will be seen, this is a difficult hurdle for a commercially sophisticated party to surmount. The concerted effort by lawyers and judges to limit commercial promissory liability to formal contract commitments is returning the commercial world to its pre-Section 90 tranquility.

These developments suggest that a reappraisal of Section 90 is appropriate. If it is conceptualized as a rule of contract law, then promissory estoppel should find its ultimate justification in the mutual benefits it confers on potential trading partners.⁸ It should, in other words, be an economically efficient⁹ rule that all parties to a transaction would prefer to submit to, *ex ante*. Yet commercial actors seem not to appreciate the advantages they gain from this doctrine. Judged by their persistent efforts to avoid estoppel liability, and by the absence of any

4. *But see* Henderson, *Promissory Estoppel*, *supra* note 1, at 387 (speculating that the next stage in the development of Section 90 would turn on policy considerations relating to bargain context of reliance claims). Later commentators were better placed to observe this phenomenon. *See, e.g.*, Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 550 (1983) [hereinafter Metzger & Phillips, *The Emergence of Promissory Estoppel*] (describing tactics that promisors may use to avoid estoppel-based liability).

5. "There is only one way to record accurately the progress of any branch of the law over a period of time; that is to review all of the cases and statutes affecting it that have been litigated or enacted during the period." Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 449 (1937). This survey obviously falls far short of Corbin's ideal, focusing as it does primarily on appellate opinions.

6. *See infra* Part IV.B.

7. *See infra* Part IV.C.

8. *See infra* Part IV.D.

9. *See* GORDON TULLOCK, *THE LOGIC OF THE LAW* 35-47 (1971), *reprinted in* ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 22 (1979).

evidence that they are deliberately using the rule to structure promissory obligations, promissory estoppel does not appear to be an efficient rule. This Article contends that the appropriate rule for commercial parties—one that is suggested by recent decisions—is that a reliance-inducing, non-bargain promise should be unenforceable in the absence of the promisor's clear expression of a specific intention to incur legal liability. In that one narrow exception, however, enforcement seems clearly warranted if the promisee actually relies on the promise.

This thesis directly contradicts prevailing academic opinion, both descriptively and normatively. In the past two decades, several scholars have proclaimed that promissory estoppel has achieved a dominant role in commercial transactions and has done so as a contract doctrine rather than as a tort doctrine. Some theorists claim that Section 90 has evolved into a new mode of contract formation that is free of both the technicalities of the consideration doctrine and the vestigial reliance requirement inherited from equitable estoppel.¹⁰ Other theorists imply that Section 90 has become a method that, like the doctrine of offer and acceptance, commercial parties can use for the deliberate creation of legal obligations.¹¹ Still others, applying economic reasoning that supports enforcement of bargain promises,¹² contend that enforcement of non-

10. See *infra* Part III.

11. See Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996) [hereinafter Barnett, *Death of Reliance*]; Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987) [hereinafter Barnett & Becker, *Beyond Reliance*] (contending that promissory estoppel is applied when the promisor has manifested consent to be legally bound and in cases of misrepresentation); Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131, 133-35 (1987) [hereinafter Becker, *Promissory Estoppel Damages*] (arguing that promissory estoppel liability is contractual because the promisor manifests an objective intent to be legally bound); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903 (1985) [hereinafter Farber & Matheson, *Invisible Handshake*] (arguing that enforcement of non-bargain, reliance-inducing commercial promises aids commercial promisors by building trust); Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987) [hereinafter Kostritsky, *A New Theory*] (explaining that promissory estoppel can be used to create legal obligations where barriers exist to formal bargain contract); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) [hereinafter Yorio & Thel, *The Promissory Basis of Section 90*] (asserting that promissory estoppel enforces promises because of the moral obligation of promise, not reliance).

12. See, e.g., Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 490-91 (1996) [hereinafter Craswell, *Efficient Reliance*]; Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249 (1996) [hereinafter Katz, *When Should an Offer Stick?*]; Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD.

bargain, commercial promises under Section 90, reduces transaction costs and encourages efficient levels of promisee reliance.¹³

These lines of argument all imply that rational, self-interested commercial actors attach a positive value to the capacity to bind themselves by informal, non-bargain promises.¹⁴ But every sign that can be gleaned from the appellate reports suggests that commercial actors overwhelmingly prefer to order their legal affairs via the well-worn channels of formal bargain contract and that they consider their potential liability under Section 90 to be more a dangerous pitfall than a valuable opportunity. The behavior of these commercial promisors casts serious doubt on the virtues of Section 90 as a contract device.

Part II of this Article describes the two forms of promisee reliance that a commercial promise might induce and that Section 90 might protect: performance reliance and enforcement reliance. While the law could theoretically enforce all promises that foreseeably induce a promisee to rely on their performance, such a rule would be overbroad. Virtually all promises in the commercial world are made in order to induce performance reliance but not all promises are enforceable.¹⁵ Promisors and promisees benefit from a legal regime that permits both enforceable and unenforceable reliance-inducing promises to be made, at the promisor's option.

Most published economic analysis of Section 90 tends to assume that legal enforcement will be efficient whenever the promisee's reliance is beneficial or efficient and that the parties would prefer such a rule, *ex ante*, in order to minimize transaction costs.¹⁶ But this "hypothetical bargain" approach conflicts with empirical evidence of actual behavior. Outside the context of formal bargain promises, commercial promisors are usually satisfied with the simple level of performance reliance that is induced by unenforceable promises. While economic analysis persuasively supports a legal rule that would enable promisors to *choose* to make designated non-bargain promises legally enforceable, it cannot

411, 412, 418-19 (1977) [hereinafter Posner, *Gratuitous Promises*].

13. See, e.g., Craswell, *Efficient Reliance*, *supra* note 12; Katz, *When Should an Offer Stick?*, *supra* note 12.

14. See Craswell, *Efficient Reliance*, *supra* note 12; Farber & Matheson, *Invisible Handshake*, *supra* note 11. By contrast, one would not expect commercial parties willingly to submit to rules of tort law, *ex ante*, although in some cases they might.

15. Compare SECOND RESTATEMENT, *supra* note 1, § 90 cmt. a (reliance is the basis of enforcement), with *id.* cmt. b (only certain reliance is protected).

16. See, e.g., Craswell, *Efficient Reliance*, *supra* note 12; Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1265 (1980) [hereinafter Goetz & Scott, *Enforcing Promises*]; Katz, *When Should an Offer Stick?*, *supra* note 12.

demonstrate that efficiency is served by enforcing all of the promises described by Section 90.

Part III considers the claim made by two popular non-economic theories of promissory estoppel that actual reliance is not, and should not be, necessary to a claim under Section 90. The promise and consent theories of contract law each reject the view that Section 90 is a tort-like rule,¹⁷ concerned with deterrence and compensation for promisees who are injured by their foreseeable reliance on broken promises. Instead, they conceive of Section 90 as a contract doctrine,¹⁸ providing an alternative to bargain promise as a way to structure a legal obligation.¹⁹ They contend that contemporary judicial treatment of Section 90 permits the creation of contractual obligation by promise alone, without the necessity of either bargained-for consideration or actual reliance.

Using a survey of all of the promissory estoppel cases reported in 1995 and 1996, I will challenge the descriptive claims that underlie these theories. Contemporary courts rigorously enforce Section 90's requirement that the promise induce actual reliance by the promisee. These courts do not enforce promises that satisfy only the simplified

17. See Barnett, *Death of Reliance*, *supra* note 11, at 521-25; Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 945 ("With the decline of reliance, promissory estoppel is moving away from tort law."); Kostritsky, *A New Theory*, *supra* note 11, at 905. Most other commentators have analyzed Section 90 as, at least in part, a tort doctrine. *E.g.*, 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.19, at 146 (1990) [hereinafter FARNSWORTH, CONTRACTS]; GILMORE, *DEATH OF CONTRACT*, *supra* note 1, at 97 (referring to promissory estoppel as "quasi-tort" liability); SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS §§ 99-100, 1338 (rev. ed. 1937); Henderson, *Promissory Estoppel*, *supra* note 1, at 345-47 (explaining that promissory estoppel is not a consideration doctrine designed to protect exchange, but an estoppel doctrine designed to protect reliance); Metzger & Phillips, *The Emergence of Promissory Estoppel*, *supra* note 4, at 506-07, 547; Seavey, *Reliance Upon Gratuitous Promises*, *supra* note 3, at 925-28; Shattuck, *Gratuitous Promises*, *supra* note 3, at 944 (arguing that the purpose of enforcement under Section 90 is compensation of injurious reliance, not the enforcement of the promise); Orvill C. Snyder, *Promissory Estoppel as Tort*, 35 IOWA L. REV. 28, 31 (1949) (contending that bargained-for consideration is the essence of contract); see also Hoffman v. Red Owl Stores, 133 N.W.2d 267 (Wis. 1965) (holding that promises too indefinite to constitute a contract offer can lead to liability for promissory estoppel and that promissory estoppel is not a substitute for consideration).

18. *E.g.*, Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 905 ("[P]romissory estoppel is being transformed into a new theory of distinctly contractual obligation."); see also SECOND RESTATEMENT, *supra* note 1, § 90 cmt. d ("A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate.").

19. *E.g.*, Kostritsky, *A New Theory*, *supra* note 11, at 902 (positing that promissory estoppel and other orthodox doctrines are "merely substitute doctrinal methods for showing the assent required for an enforceable consensual exchange.").

grounds of enforceability proposed by the promise and consent theorists, i.e., serious promises made in furtherance of a commercial objective.

The evidence of contemporary practice that can be gleaned from these cases also casts serious doubt on the normative arguments of the consent and promise theorists, who contend that *prima facie* legal enforceability of non-bargain, business-related promises would facilitate commercial exchanges and give effect to promisors' actual or probable intention to be legally bound. Contemporary commercial practice instead implies that this suggestion would be an inefficient default rule because most commercial promisors would probably contract around it.²⁰

Part IV examines the recent growth of a requirement of enforcement reliance in three commercial contexts in which courts appear to have added to the text of Section 90 a requirement that a commercial promisee show that she relied on the legal enforceability of the promise rather than the likelihood that it would be performed. This trend can be seen in the persistent refusal to enforce oral promises of permanent employment; in the judicial enforcement of disclaimers designed to forestall liability under Section 90; and, in the imputation to commercial promisees of knowledge that some non-bargain promises are formally unenforceable and hence unreliable for Section 90 purposes. By requiring promisees to demonstrate enforcement reliance, these courts preserve a role for the unenforceable commercial promise and preserve promisor choice.

The new requirement that a successful claimant demonstrate a reasonable belief that the non-bargain promise he relied upon was legally enforceable when made threatens to transform Section 90 from a commercially useful rule into a meaningless paradox, akin to a Catch-22. A commercial promisee who is legally sophisticated enough to take Section 90 into account in making a reliance decision would also be expected to know that non-bargain, commercial promises are generally unenforceable. Such a promisee could never satisfy the new test, unless courts also recognize a new category of potential contract obligation. They could do this by enforcing reliance-inducing promises that are made with an expressed intention that they be legally enforceable. A promisee's reliance on that expression would constitute enforcement reliance.

The rarity of successful claims for promissory estoppel in the sample demonstrates a systematic exclusion of promissory estoppel from the commercial world.²¹ Far from causing the death of contract, Section 90

20. See *infra* Part III.

21. See *infra* Part III. I follow several others in noting the rarity of successful claims for promissory estoppel and the judicial hostility to the theory. Robert A. Hillman, *The Triumph of Gilmore's The Death of Contract*, 90 NW. U. L. REV. 32, 39-40 (1995); Amy H. Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 NW.

has itself been virtually extinguished from much of the commercial landscape by the reactive adaptation of the bar and the bench. I contend that there is little reason to regret its demise.

II. ENFORCEMENT RELIANCE AND PERFORMANCE RELIANCE

A. A Promisor-Choice Model of Contract Enforcement

My analysis is grounded on the normative premise that commercial²² non-bargain promises, like bargain promises, should be given legal enforcement under Section 90 solely in order to facilitate exchange.²³ Whether enforcement of any category of promise will have this effect depends on the interrelation of the effects of promisee reliance,

U. L. REV. 132, 135-37 (1995) (noting that only two out of forty-five reported promissory estoppel cases in New York affirm judgments for plaintiffs); Pham, *Waning*, *supra* note 2, at 1263 ("Courts' extreme reluctance to grant recovery under promissory estoppel indicates a continued adherence to traditional contract principles of bargained-for exchange.").

22. This Article thus has no necessary application to the enforcement of non-commercial promises under Section 90. It may be that assumptions about the power and legal knowledge of non-commercial actors would lead to different conclusions than those I reach. There may also be other reasons for enforcing certain non-commercial promises.

23. Most scholars agree that *bargain* promises are legally enforced in order to increase the gains available through trade. Enforceability encourages promisees to enter into bargain contracts by reducing their risk of disappointed reliance. See SECOND RESTATEMENT, *supra* note 1, § 72 cmt. b.; Craswell, *Efficient Reliance*, *supra* note 12, at 492; Farber & Matheson, *Invisible Handshake*, *supra* note 11; L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 61-63 (1936) [hereinafter Fuller & Perdue, *The Reliance Interest*]; Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1265; Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 941 (1958). Under this rationale, the enforcement of bargain promises reduces the transaction costs, including credit risks, that parties would otherwise incur in non-instantaneous or non-simultaneous exchanges. See, e.g., SECOND RESTATEMENT, *supra* note 1, ch. 16 Reporter's Note; ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 3-5 (1979); K.N. Llewellyn, *Contract: Institutional Aspects*, in 4 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 329, 330-31 (Edwin R.A. Seligman & Alvin Johnson eds., 1931); Fuller & Perdue, *The Reliance Interest*, *supra*, at 60-61. The facilitation of trade may also result from enforcement of some non-bargain commercial promises ancillary to the creation of bargain contracts, as in the case of options. Craswell, *Efficient Reliance*, *supra* note 12, at 495-99; Farber & Matheson, *Invisible Handshake*, *supra* note 11; Goetz & Scott, *Enforcing Promises*, *supra* note 16; Kostritsky, *A New Theory*, *supra* note 11.

This Article does not consider arguments for promissory estoppel based on deontological principles, corrective justice principles, or other non-consequentialist grounds. Non-consequentialist arguments generally have difficulty in developing principled justifications for the non-enforcement of reliance-inducing promises and thus imply a scope for legal intervention that many would find to be overbroad.

the rules of legal enforceability, and the parties' awareness of those rules. This relation has been remarked upon in passing by other promissory estoppel theorists, but it has not usually been given full weight in the associated analysis.²⁴

Promising and Relying. A promise is a speech act that commits the promisor to act or refrain from acting in a specified way²⁵ and makes him²⁶ in some way answerable if he fails to do so. This Article is premised on the contention that the *sole* rationale for making a commercial promise is to induce the promisee to react to the commitment made by the promisor.²⁷ More specifically, self-interested commercial actors make a commercial promise for only two reasons: to "sell" the promise in a bargained-for exchange or to induce the promisee to rely in some way on the promisor's commitment to perform a non-bargain

24. The notable exceptions to this generalization are Goetz & Scott, *Enforcing Promises*, *supra* note 16, and, more recently, building on their work, Craswell, *Efficient Reliance*, *supra* note 12.

25. SECOND RESTATEMENT, *supra* note 1, § 2(1) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."). A speech act is a statement that performs some conventionally recognized deed, such as promising, threatening, christening, etc. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS: THE WILLIAM JAMES LECTURES DELIVERED AT HARVARD UNIVERSITY IN 1955*, at 4-11 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (describing performative statements); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE*, 54-62 (1970) [hereinafter SEARLE, *SPEECH ACTS*] (describing the necessary and sufficient conditions for the speech act of promising); Peter M. Tiersma, Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189 (1986) [hereinafter Tiersma, *Language of Offer and Acceptance*].

Some economic analysis seems to ignore the commitment a promise creates. In their economic analysis of Section 90, Goetz and Scott describe promises solely as information: "The promise itself is merely the production of a piece of information about the future." Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1267. As mere information, however, promises are indistinguishable from representations of fact about a promisor's intention, representations that could just as well be made by informed third parties. But as Section 2 of the Second Restatement provides, promises are also legally operative speech acts committing the promisor to act. *See also* Tiersma, *Language of Offer and Acceptance*, *supra* (effect of offer and acceptance is to create a commitment by the speaker). Promises are distinguishable from purely informational statements of the speaker's present intention. SECOND RESTATEMENT, *supra* note 1, § 2 cmt. e.

26. As a convention, this Article will use the feminine pronoun for promisees and the masculine for promisors.

27. *See* P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 81-83 (1979) [hereinafter ATIYAH, *RISE AND FALL OF FREEDOM OF CONTRACT*] (explicating the 18th century views of Hume and Smith); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 276 (1986) [hereinafter Barnett, *A Consent Theory*] ("[E]very promisor should reasonably expect to induce reliance."); Pham, *Waning*, *supra* note 2, at 1286.

promise.²⁸ While it is possible that a social promise might be made for other reasons,²⁹ the “point” of communicating a commercial promise to the promisee can only be to achieve one of these goals. This Article concerns only non-bargain promises. Rational commercial promisors will make non-bargain promises only when their expected benefit from the promisee’s anticipated reliance exceeds the expected cost of making the promise, including the expected cost of performance and any potential liability for breach.³⁰ Self-interest also explains the reliance that such promises actually induce. In non-legal understanding, a promisee’s reliance on a promise can be defined as any choice she makes because of a belief that the promise will be performed under circumstances in which the performance of the promise will be beneficial to her interests or

28. See Craswell, *Efficient Reliance*, *supra* note 12, at 487 (referring only to enforceable commitments); Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1266-67 (explaining that the function of promise is adaptation by the promisee). Promisee reliance is implicit in the Restatement definition of “promise,” which is couched in terms of the promisee’s understanding. See *supra* note 25.

29. There may be other social or psychological motives behind a non-commercial promise, for example, to create or reinforce a valuable personal relationship, to fulfill a traditional or conventional expectation, or to act as a precommitment strategy for the promisor.

30. Craswell, *Efficient Reliance*, *supra* note 12, at 495-97. The most common type of benefit to a commercial promisor from a promisee’s reliance on a non-bargain promise is the facilitation of a subsequent exchange transaction with the promisee: non-bargain promises lead to bargain promises. A classic example is the option contract, in which a promisor gratuitously promises to keep an offer open for a period of time during which the promisee can investigate whether to accept. For application of promissory estoppel to an option contract otherwise unsupported by consideration, see *Strata Prod. Co. v. Mercury Exploration Co.*, 916 P.2d 822 (N.M. 1996). Option contracts are referred to as “firm offers” in Article 2 of the Uniform Commercial Code, which provides that they are enforceable without consideration if contained in a signed writing. See U.C.C. § 2-205 (1995). The economic analysis of the enforceability of option contracts can be found in Craswell, *Efficient Reliance*, *supra* note 12, and Katz, *When Should an Offer Stick?*, *supra* note 12.

Closely related is the “no-shop” promise made by a company to a potential buyer, promising not to negotiate for its sale until the buyer has had time to perform a due diligence examination and arrange financing for a bid. See *infra* Part IV.D (discussing *Kysor Indus. Corp. v. Margaux, Inc.*, 674 A.2d 889 (Del. Super. Ct. 1996)).

In each case, the promise—to hold the offer open, to refrain from negotiations—may be “gratuitous” but is aimed at an exchange transaction. Whether or not a bargain is the ultimate goal, however, I will assume that all non-bargain, commercial promises are made in order to induce reliance beneficial to the promisor.

A related goal of commercial promising is the hope of reciprocity in favor-giving. A commercial party may be able to offer a promise of a benefit to another party in the hope and expectation of receiving a return of some sort in the future. One could consider this type of promise as an implicit bargain promise.

desires.³¹ In the paradigmatic case, the promisee will be better off if she relies and the promise is performed, and worse off if she relies and the promise is breached, than she would be if she did not rely at all.³² Given the uncertainty about whether the promise will be performed, therefore, a promisee who relies on a promise takes a risk in order to obtain a benefit.³³

That risk is altered by legal enforceability. Two types of reliance are possible within a legal system that differentiates between enforceable and unenforceable promises. When a promisor makes a promise that the promisee recognizes to be unenforceable, the promise can induce only "performance reliance." The promisee relies solely on her estimate of the likelihood that the promisor will perform, without any expectation of a legal remedy if the reliance is disappointed. The promisee decides whether and how much to rely by assessing the promisor's honesty and reliability, the circumstances bearing on the probability of performance and breach, the benefits that reliance followed by performance would confer, and the costs that disappointed reliance would impose.³⁴ These factors determine the expected value of reliance on the promise.

If, however, the promisor makes a promise that the promisee recognizes to be legally enforceable, then the promise will induce what I will refer to as "enforcement reliance." The promisee relies both on the credibility of the promise and on the belief that she will have a legal remedy for some or all of the costs of disappointed reliance if the promise is not performed. The expected value of an enforceable promise is greater than that of an otherwise identical unenforceable one because of two distinct effects of enforceability: (1) the exposure to a damages award tends to deter a promisor from breaching,³⁵ which makes performance

31. Cf. SEARLE, *SPEECH ACTS*, *supra* note 25, at 58 ("A promise is defective if the thing promised is something the promisee does not want done. . . .").

32. Craswell, *Efficient Reliance*, *supra* note 12, at 490; Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1264.

33. Craswell, *Efficient Reliance*, *supra* note 12, at 490; Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1264.

34. Goetz and Scott point out that even reliance on uncertain promises is reasonable in terms of expected value if the benefit of performance is high in relation to the cost of disappointment. Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1270-71 & n.27, 1306 n.107 (describing how reliance on a promise known to be unenforceable may be reasonable on the basis of expected value, though courts do not so characterize it).

35. See Fuller & Perdue, *The Reliance Interest*, *supra* note 23, at 61 & n.12 (stating that damages for breach of contract may in part be justified by deterrence of breach). The effect of enforceability is actually somewhat more complex because the promisor's manifested willingness to make an enforceable promise also signals to the promisee that the promisor is confident of performance. This inference arises because the promisor can be presumed to assess the potential costs of breach and enforcement as less

more probable, and (2) the potential indemnification for loss makes disappointment less costly. In a system that permits the promisee to sue for damages for breach, these two effects, of course, are interrelated because the deterrence effect depends on the likelihood that a disappointed promisee will make a damages claim.

By increasing the expected value of a promise to the promisee, enforceability permits the commercial promisor to offer a stronger inducement to the promisee to rely in a way that will benefit the promisor.³⁶ But enforceability also makes the promise more costly to the promisor, who incurs the additional risk of legal liability for breach.³⁷ A promisor must decide whether the expected benefits of the increased promisee reliance induced by enforceability exceed its expected costs. If the costs of enforceability exceed its benefits to the promisor, he may prefer to make an unenforceable promise. An unenforceable promise is less costly to the promisor and entails a lower degree of commitment, and so is also less effective in inducing a promisee's reliance. A promisor's refusal to make a promise enforceable indicates that the expected cost of enforceability exceeds the expected benefit to the promisor of the additional reliance that enforceability will induce. Nevertheless, legally unenforceable promises are made and intended to induce reliance on this lower degree of commitment.

This idealized account rests on the assumption that both parties can distinguish enforceable from unenforceable promises. While a promisor-choice model obviously requires promisors to understand how to make promises enforceable or unenforceable, it also requires promisees to be able to recognize the difference. Indeed, none of the extra benefits of enforcement reliance will accrue to the promisor unless the promisee actually believes that the promise is enforceable when deciding whether to rely. A promisee who is unaware that the promise is legally enforceable will rely only at the level justified by the promisor's intrinsic

than the benefits of reliance. The signaling effect can reduce "bonding" costs that the promisor might otherwise incur in reassuring the promisee that the promise will be performed. See *id.*; see also Farber & Matheson, *Invisible Handshake*, *supra* note 11.

36. See Craswell, *Efficient Reliance*, *supra* note 12, at 495-501. In the non-commercial world, enforceability also increases the value of a gratuitous promise as a gift. See Posner, *Gratuitous Promises*, *supra* note 12, at 412, 418-19 (arguing that enforceability increases the utility of the promise to the promisee and permits the promisor to give a more valuable gift at lower cost); see also Goetz & Scott, *Enforcing Promises*, *supra* note 16.

37. The risk of enforceability is an expected cost to the promisor. See Posner, *Gratuitous Promises*, *supra* note 12; see also Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1264. The expected cost of this increased liability depends on the promisor's estimate of the likelihood of performance. If he is, for example, highly confident of performance, then it will cost him little to make the promise enforceable.

credibility, though the promisor will incur the extra cost imposed by the risk of breach and remedy.³⁸ A promisor has no motive to make a (more costly) enforceable promise that the promisee does not realize is enforceable at the time of reliance. To obtain the benefits of enforceability in the form of greater reliance by the promisee, the promisor must communicate the fact of enforceability to the promisee. If the legal rule of enforceability is uncertain or the promisee is not fully aware, the promisor has an incentive to incur at least some level of cost in communicating information about the enforceability of his promise.³⁹ Otherwise he will not receive the higher level of reliance that his promise has earned.

Under a promisor-choice model of contracting, a promisor's intention to induce foreseeable reliance does not imply that he intends to incur an enforceable obligation: he may be seeking to induce only performance reliance. Thus, in deciding what overt signs one should use to identify enforceable commercial promises, it would be inaccurately overbroad to use a promisor's mere manifestation of an intention to induce reliance.⁴⁰ Conversely, a promisee's reliance on the likelihood that a promise will be performed is not equivalent to her reliance on its enforceability; nor is the disappointment or harm that follows non-performance a sufficient reason for enforcement.⁴¹

38. Potential enforcement costs exist if the promisor anticipates that he will be sued for breach if the promisee discovers the legal basis of her claim after breach. Enforceability would otherwise impose no expected cost on the promisor.

39. Conversely, the promisor will benefit if the promisee mistakenly believes an unenforceable promise to be enforceable. Such a promisor has an incentive to misrepresent or conceal the unenforceable nature of the promise at some cost.

40. While this point may seem obvious, several theorists have assumed that a promisor's apparent willingness to induce a promisee to rely on a promise is, or should be, considered a manifestation by the promisor of his consent that the promise be legally enforceable. See ATIYAH, *RISE AND FALL OF FREEDOM OF CONTRACT*, *supra* note 27, at 652-59; Barnett, *A Consent Theory*, *supra* note 27; Becker, *Promissory Estoppel Damages*, *supra* note 11, at 133; Craswell, *Efficient Reliance*, *supra* note 12; Fuller & Perdue, *The Reliance Interest*, *supra* note 23, at 58 (implying that enforcement is justified in order to protect any reliance that has social utility); Pham, *Waning*, *supra* note 2, at 1285-86; Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 115, 167. *But cf.* *State Bank of Standish v. Curry*, 500 N.W.2d 104 (Mich. 1993) (Riley, J., dissenting) (arguing that to enforce any promise that induces reliance is to make all promises enforceable).

41. As Fuller and Perdue recognized:

[T]he policy in favor of facilitating reliance can scarcely be extended to all promises indiscriminately. Any such policy must presuppose that reliance in the particular situation will normally have some general utility. Where we are dealing with "exchanges" or "bargains" it is easy to discern this utility since such transactions form the very mechanism by which production is organized in a capitalistic society. There seems no basis for assuming any such general

My analysis of the appropriate role of promissory estoppel in the commercial world thus proceeds from the following assumptions:

1. If it is to be justified as an element of contract law, Section 90 must facilitate trade by offering to trading parties a legal capacity that they would, *ex ante*, both prefer to have.⁴²
2. Both performance reliance and enforcement reliance can facilitate trade. The promisor should have the legal power to choose which form of reliance he intends to induce, based on his assessment of the relative costs and benefits of enforceability.⁴³ Legal conventions should enable a promisor to make any commercial promise clearly and expressly enforceable or unenforceable, at a minimum cost.⁴⁴

utility in the promises coming under [Section] 90, since they are restricted only by a negative definition—they are not bargains.

Fuller & Perdue, *The Reliance Interest*, *supra* note 23, at 65; *see also* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 579-80 (1933) (contending that reliance alone does not explain why some promises are enforced and others are not).

42. P.S. Atiyah describes the paradigm model of contract as follows:

The law of contract, it is said, consists of power-conferring rules. The law provides facilities for private parties to make use of them if they so wish.

Those who wish to create legal obligations have only to comply with a simple set of rules and the result will be recognised by the law.

P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 LAW Q. REV. 193, 195 (1978) [hereinafter Atiyah, *Law of Obligations*]. While this assumption holds for some of the rules of contract law, it does not hold for all of them. Regardless of wealth or power disparities, there are some rules of contract law that both parties would want to be binding on themselves, *ex ante*, such as that bargain promises are legally enforceable and are created by certain conventional forms. Each party would want to be bound by his promises as well as to bind the other. But a powerful party might not want the doctrines of duress or unconscionability to apply to himself *ex ante*. Each party would have reason to wish the other party subject to such rules but would have no reason to desire to have itself subject to such rules.

43. *See* Craswell, *Efficient Reliance*, *supra* note 12, at 483 (explaining that the rules of contract formation should give effect to the parties' likely intentions); Henderson, *Promissory Estoppel*, *supra* note 1, at 357 ("The general objective of these assorted rules [of offer and acceptance in contract law] is to guarantee parties seeking an exchange extensive freedom to express, or to refuse to express, a willingness to be bound.").

44. Legal commentators of many different theoretical orientations have affirmed the value of a rule permitting promisors to make their promises legally binding by making some unambiguous sign of enforceability, as was once the case with the seal. For example, in commenting on proposed Section 80 and a proposal that a written recital of payment of a nominal consideration would render a promise enforceable, Williston stated:

3. The success of an enforcement regime such as this depends on promisee awareness of both legal rules and the conventional signs of enforceability. Enforceability is valueless to the promisor unless it is known to the promisee when she decides to rely or to purchase the promise.

This idealized model of contract behavior emphasizes the utility of permitting promisors to choose from a range of reliance-inducing commitments—from no promise, to unenforceable promise, to enforceable promise—and of a judicial practice that respects these choices. A model premised on the utility of promisor choice implies that, notwithstanding conventional doctrines of consideration, a commercial promise should be legally enforceable or unenforceable in accordance with any clear manifestation to the promisee of such an intention.

How then should such an idealized law deal with non-bargain commercial promises made without an express manifestation by the promisor of an intent that they be enforceable? On the assumption that the promisor and promisee will be aware of the applicable rule, this question simply seeks the default rule for interpretation of such promises. There are several plausible candidates. Such promises could all be enforceable, or all unenforceable, or enforceable only under certain conditions, e.g., if made in conjunction with a request for reliance. Bearing in mind that the utility of enforcement depends on promisee awareness, one might surmise that the choice of a default rule should turn on the frequency with which promisors intend their non-bargain promises to be understood to be enforceable, which is an empirical question. I contend that, as a matter of fact, commercial promisors rarely want their non-bargain promises to be legally enforceable and that when they do,

[I]t produces the result that I have spoken of and which I deem very desirable, that where seals have been abolished as they have been in so many states, parties nevertheless can make a binding promise to give a house [in return for a dollar], if they so intend, without exacting consideration which is equivalent or supposed to be so.

PROCEEDINGS, *supra* note 2, at 73; see also CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 39 (1981) [hereinafter FRIED, *CONTRACT AS PROMISE*]; Barnett, *A Consent Theory*, *supra* note 27, at 310-12; Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1278 n.41; Posner, *Gratuitous Promises*, *supra* note 12, at 419-20. Often this sentiment is expressed as a view that consideration is itself a mere formality. See *Krell v. Codman*, 28 N.E. 578 (Mass. 1891) (Holmes, J.); OLIVER W. HOLMES, *THE COMMON LAW* 230 (Mark D. Howe ed., Belknap Press 1963) (1881) ("A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding."); Barnett & Becker, *Beyond Reliance*, *supra* note 11, at 450 ("[C]onsideration is a formality much like the formality of the sealed instrument.").

they clearly express such an intention. From the promisor's perspective, such an expression is essential to the promisee's awareness of enforceability that is, in turn, essential to any benefit to the promisor resulting from enforcement reliance. Promisors have an economic motive to inform the promisee of enforceability in order to induce the higher level of reliance that enforceability warrants. They do not have a comparable motive to inform the promisee of non-enforceability. Because a rule of non-enforcement in the absence of an expression of enforceability would coincide with promisor incentives, it would reduce the transaction costs of contracting around it and would for that reason be more efficient than its opposite. It is thus the thesis of this Article that Section 90 should be used to enforce only those reliance-inducing promises that are accompanied by an expression by the promisor that he intends that the promise be legally enforceable.

B. Section 90 and Enforceability

The idealized model of promisor choice only imperfectly represents contract doctrine as it exists today. Section 90 in particular appears to reduce the commercial promisor's options by effacing much of the distinction between enforceable and unenforceable promises. Under Section 90:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person [which we have seen includes virtually all commercial promises] and which does induce such action or forbearance [as virtually all commercial promisors intend] is binding [i.e. enforceable] if injustice can be avoided only by enforcement of the promise.⁴⁵

The "avoidance of injustice" element is all that prevents Section 90 from making all relied-upon, commercial promises enforceable, and thereby eliminating mere performance reliance from the commercial world. In addressing the question of what it means to say that enforcement is necessary to avoid injustice, the comments to Section 90 direct the court to base its decision on:

the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to

45. SECOND RESTATEMENT, *supra* note 1, § 90(1).

which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.⁴⁶

This multi-factor test may accomplish many things, but it fails to give controlling effect to promisor choice or promisee understanding about the intended enforceability of the promise. A commercial promise might satisfy all of these criteria and nevertheless be both intended and understood to create no legal liability. Such is the case when a highly formalized promise is accompanied by an express disclaimer of enforceability: most courts will not enforce such a promise even if the promisee reasonably relies on performance.⁴⁷ Although the possibility of disclaiming enforceability does not appear in the text of Section 90, most courts hold that justice does not require enforcement of a relied-upon promise under circumstances in which a reasonable promisee would have believed that she would have no legal remedy for breach.⁴⁸ By refusing to protect pure performance reliance in disclaimer cases, these courts implicitly affirm that enforcement reliance is essential to an action under Section 90.

A frequent objection to a requirement of enforcement reliance, however, is that it would introduce a circularity into Section 90.⁴⁹ If a

46. *Id.* § 90 cmt. b.

47. *See infra* Part IV.B.

48. This reasoning is obviously circular, since it is precisely the efficacy of the disclaimer that is in question.

49. The potential for circularity in Section 90 is often remarked upon. For example, Barnett describes the problem as follows:

[W]hat many people would do in reliance on a promise is crucially affected by their perception of whether or not the promise is enforceable. . . .

. . . A prediction that a promise can reasonably be expected to induce reliance by a promisee or third party will unavoidably depend upon whether the promisee or third party believes that reliance will be legally protected.

The legal rule itself cannot be formulated based on such a prediction, however, without introducing a practical circularity into the analysis.

Barnett, *A Consent Theory*, *supra* note 27, at 275; *see also* Atiyah, *Law of Obligations*, *supra* note 42, at 214 (explaining that it is "somewhat circular" to justify enforcement by the promisee's reasonable expectation if the reasonableness of the expectation "turns largely upon whether it is in fact protected"); Barnett & Becker, *Beyond Reliance*, *supra* note 11, at 446-47 ("The black letter of the doctrine is too circular to have descriptive or predictive power: how can enforcement turn on the reasonableness of reliance when the reasonableness of reliance will necessarily depend on enforceability?"); Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1264 n.15 ("[I]f moral force is attached to promises merely because people rely upon them, the argument is subject to the claim that such

non-bargain promise is made enforceable because the promisee's reliance was foreseeable, and the promisee's reliance was foreseeable because she foreseeably believed that the promise would be enforceable, then Section 90 seems to be either overbroad, unnecessary, or mischievous, depending on the source of the promisee's belief. If the basis of her belief in enforceability is the simple fact of her reliance on the promise's performance, then Section 90 is overbroad in protecting all performance reliance. If the basis of her belief in enforceability is something other than her reliance, then it is either accurate (in which case Section 90 is superfluous) or it is mistaken (in which case Section 90 would undermine other rules of non-enforceability). In any event, Section 90 itself gives no clue as to the (otherwise unenforceable) promises that a reasonable promisee would believe to be enforceable.

Some commentators avoid this logical puddle by advocating enforcement of *all* commercial promises that both parties recognize are made to induce reliance, opting for overbreadth.⁵⁰ This position is tantamount to a rule of enforcement of all serious commercial promises in which a disclaimer is not made. But while such a rule, once announced, is consistent with the promisor-choice theory of contract enforceability, it is no more so than its opposite: that Section 90 enforces *only* those relied-upon commercial promises in which the promisor expresses an intention to be legally bound. As Richard Craswell has recognized in analyzing a similar issue, if we assume legal awareness by both parties, either "default" rule would be equally consistent with the promisor's autonomy and the promisee's ability to rely beneficially.⁵¹

Despite this symmetry, however, the preceding analysis of the rationale for commercial promises implies that the second rule—no enforcement without a specific statement of intent to be legally bound—is more likely to coincide with the natural tendency of a commercial promisor to reassure the promisee whenever the promise is intended to be

reliance is dependent upon legal enforceability."); Katz, *When Should an Offer Stick?*, *supra* note 12, at 1254.

In contrast, Richard Craswell contends that if Section 90 is pegged to an objective standard of reasonable reliance that has reference to the likelihood that beneficial reliance would result from enforceability *ex ante*, then the problem of circularity can be avoided. Craswell, *Efficient Reliance*, *supra* note 12; see also Jim Leitzel, *Reliance and Contract Breach*, 52 LAW & CONTEMP. PROBS. 87, 88 (1989). Craswell assumes, however, that this calculation would be feasible only for purposes of developing the theory of efficient reliance and acknowledges its difficulty of application in practice. Craswell, *Efficient Reliance*, *supra* note 12, at 501.

50. E.g., Barnett, *A Consent Theory*, *supra* note 27.

51. Craswell, *Efficient Reliance*, *supra* note 12, at 485-86; see also Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 512-15 (1989) [hereinafter Craswell, *Default Rules*].

legally enforceable. No commercial promisor would ever want to make an enforceable Section 90 promise without such an express statement because he would be incurring the potential cost of enforceability without its beneficial effect on promisee reliance.

The proposed default rule is consistent with the text of Section 90. If justice does not require the enforcement of a promise that the promisee, because of a disclaimer, had reason to believe was legally unenforceable, then justice should not require enforcement of a promise that the promisee had no reason to believe was legally enforceable. In light of common commercial practice, legally sophisticated commercial promisees have no reason to believe that a non-bargain promise made by a commercial promisor is legally enforceable in the absence of a manifested intention that it be so. To grant *ex post* enforcement of such promises does not serve to induce efficient reliance and increases transaction costs of contracting.

Conversely, to enforce a non-bargain promise that is accompanied by an expression of intent that it be legally binding would resolve the circularity problem with a minimum of violence to logic and existing contract doctrine. The promisee's belief in enforceability would be well-grounded, not mistaken, in the new rule. Section 90 would be neither overbroad, superfluous, nor mischievous.

C. Section 90 and Efficient Reliance

Economic analysis is quintessentially instrumentalist in its view that law is primarily a means of directing or influencing behavior.⁵² Indeed, economic analysis of a contract rule such as Section 90 seeks to find its sole justification in the economic effects of such behavioral adaptations.⁵³ A rule that protects a person's reliance on the promises of another person

52. By "instrumentalist" I refer to the view that law is primarily concerned with establishing incentives and disincentives in order to influence behavior. See RICHARD A. POSNER, *OVERCOMING LAW* 4 (1995); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 29 (1990) (identifying instrumentalist, means/ends jurisprudence with a pragmatic approach to law); ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* 43-44 (2d ed. 1993); Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1263-64.

Though it is probably the dominant strain in contemporary contracts jurisprudence, instrumentalism has its critics. See ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982) (noting numerous descriptive and normative problems with pragmatic instrumentalism); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1030 (1981) (criticizing the accepted view that all law is adaptive); Karl E. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 *N.Y.U. L. REV.* 876, 881 n.20 (1979) (book review).

53. Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1263-64.

will influence both the quantity and quality of such promises and the amount of such reliance on them that will occur, so long as the parties are assumed to be aware of the rule.⁵⁴ Thus far, economic analysis has sought to demonstrate that Section 90 will encourage efficient levels of reliance on non-bargain promises and that this reliance would not occur in its absence.

An instrumentalist analysis of Section 90 must begin by acknowledging that, like most common law, Section 90 was not the product of self-conscious social engineering. The little story of how Section 90 came to be has now achieved the status of an originary myth among contracts scholars.⁵⁵ The authors of the first Restatement did not conceive their role as writing behavioral rules on a blank slate, but as collecting and synthesizing the common law as they found it. The Gilmore/Corbin story has it that Section 90 was written because the bargain exchange theory of consideration failed to explain the outcomes in many cases in which promisees had been given remedies for the breach of gratuitous or otherwise unbargained-for promises.⁵⁶ The Restaters

54. See *id.* at 1264.

55. Interested readers may consult the sacred text in GILMORE, DEATH OF CONTRACT, *supra* note 1, at 62-64. In Gilmore's version, Williston and the other Restaters were prepared to enthrone the bargain consideration doctrine expressed in Section 75 (now Section 71) as the exclusive source of contractual enforceability when they were challenged by Corbin, waiving a sheaf of "hundreds" of cases in which common law courts had enforced non-bargain promises after the promisee had relied. The need to accommodate this authority led to the supplementary and subversive reliance-based doctrines of Sections 88-90. *Id.* Doubt was recently cast on Gilmore's account of Williston's and Corbin's respective roles in this drama by evidence that Williston himself drafted Section 90, as noted in a letter from Arthur L. Corbin to Robert Braucher, the original Reporter for the Second Restatement of Contracts. Joseph M. Perillo, *Twelve Letters from Arthur L. Corbin to Robert Braucher Annotated*, 50 WASH. & LEE L. REV. 755, 769 n.40 (1993); see also E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1455-61 (1987) (tracing the evolution of Williston's and Corbin's beliefs about promissory estoppel from 1903 through 1930 by reference to their contracts casebooks).

56. See *supra* note 55. It has been argued that the chronology implicit in this account—that the classical consideration doctrine of the nineteenth century was followed by gradual recognition of reliance as a basis of contract enforcement—ignores judicial recognition of reliance as a basis of contract in earlier times. Compare ATIYAH, RISE AND FALL OF FREEDOM OF CONTRACT, *supra* note 27, at 739-79 and MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 161-93 (1977) and Feinman, *Promissory Estoppel and Judicial Method*, *supra* note 2, at 679 with A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 561-67 (1979) (arguing that Horwitz's thesis rests on a romanticized version of eighteenth century law and a misinterpretation of the case law).

Whether reliance was in fact protected before nineteenth century classical contract theory is irrelevant to my argument, however, which focuses on the decision of the

synthesized the principles announced in these cases into the very abstract generalization expressed in Section 90, apparently without considering its intended effects on the reliance of legally aware, commercial promisees. The Restaters did not discuss the adaptive, reliance effects of Section 90 in their analysis of promissory estoppel.⁵⁷

Indeed, one can make a strong case that the Restaters did not consider Section 90 to be a rule of behavioral adaptation at all. Instead of a legal constraint that promisors and promisees would be expected to take into account at the time of promising or relying, Williston seems to have considered Section 90 to be a tool with which courts could achieve *ex post* equitable results in cases in which the doctrine of bargain contract would almost, but not quite, fit:

Unquestionably, the word "injustice" [in Section 90] . . . leaves a certain leeway one way or the other to the judge. As someone expressed it, in regard to [Section 90], if you bind up too closely, with definite mathematical rules the law of consideration, the boiler will burst. You have got to leave the court a certain leeway outside of those mathematical and exact rules. This section is, so to speak, the safety valve for the subject of consideration.⁵⁸

If, as Williston said, Section 90 was intended to give courts leeway outside the exact rules of consideration, it would be aimed at *ex post* corrective justice considerations rather than *ex ante* behavioral incentives.⁵⁹ Williston apparently did not view Section 90 as having

Restaters and others to give protection to unbargained-for reliance in the twentieth century.

57. See PROCEEDINGS, *supra* note 2. More generally, the drafters of the First Restatement intentionally refrained from presenting supporting policy arguments. Lon L. Fuller, *Introduction* to 2 THE 20TH CENTURY LEGAL PHILOSOPHY SERIES: THE JURISPRUDENCE OF INTERESTS at xx (Johnson Reprint Corp. 1968) (M. Magdalena Schoch ed. & trans., 1948) ("The law [the Restatements] expound is not exactly a purposeless law, but it is a law intentionally abstracted from its purposes in the process of exposition, on the theory that this divorce is conducive to certainty in application."); Samuel Williston, *The Restatement of Contracts: Statement by Samuel Williston*, 18 A.B.A. J. 775, 776-77 (1932) (explaining that the Restaters thought that it was better to present the results of their research in a statutory form without supporting arguments). Both authorities (Fuller and Williston) are cited in ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* 50-51 (3d ed. 1997).

58. PROCEEDINGS, *supra* note 2, at 86.

59. If so, Section 90 would be what Mier Dan-Cohen refers to as a decision rule (directed at judges) rather than a conduct rule (directed at parties). See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV.

been designed or intended to have prospective effects on either promising or relying. Indeed, it would be difficult for parties to predict such effects if estoppel had to operate outside "exact rules."

Williston's conception of Section 90 obviously conflicts with the instrumentalist premises of economic analysis of law. So long as rational, self-interested parties are aware of the legal effects of promising and relying, Section 90 cannot *but* have an effect on those behaviors, and it is this reaction that economic analysis seeks to ascertain. The most recent of these attempts is that of Richard Craswell,⁶⁰ who argues that the enforceability of pre-contractual promises is intended to induce the promisee to choose an efficient level of reliance on the promise.⁶¹ Section 90 operates efficiently when it shifts the cost of non-performance to the promisor in precisely those cases in which the promisor can bear that risk at less cost than the promisee.⁶² Craswell argues that the courts enforce those non-bargain, pre-contractual promises in which the promisee's reliance is economically efficient.⁶³

According to Craswell, when a promisor expresses an intention to be or not to be legally bound by a non-bargain promise, efficiency dictates that the courts respect and enforce that intention.⁶⁴ He thus adopts a promisor-choice rule when such a choice is expressed. In cases in which the promisor does not express such an intention, Craswell contends that the court should effectuate the hypothetical bargain that the parties would

L. REV. 625 (1984). As with the rules of criminal law discussed by Dan-Cohen, Section 90 might become reflexive and counter-productive if explicitly relied upon by commercial actors. I explore this possibility in Sidney W. DeLong, *Reliance on Rules on Reliance* (in progress) (unpublished manuscript, on file with author).

60. Craswell, *Efficient Reliance*, *supra* note 12. I will focus on Craswell's analysis because he builds on the pioneering work of Goetz and Scott. See Goetz & Scott, *Enforcing Promises*, *supra* note 16. Avery Katz, however, has also conducted an economic analysis of the role of estoppel in bid cases. See Katz, *When Should an Offer Stick?*, *supra* note 12 (focusing on the relative bargaining power of offerors and offerees).

61. Craswell, *Efficient Reliance*, *supra* note 12, at 483-85 (citing Goetz & Scott, *Enforcing Promises*, *supra* note 16). Craswell explains that the efficiency of reliance on a promise that precedes the formation of a contract depends on three factors:

(1) the extent to which [the promisee's] reliance would have increased the value of the transaction, if the transaction had been consummated; (2) the extent to which [the promisee's] reliance increased his losses, if the transaction was not consummated; and (3) the estimated probability, at the time that [the promisee] had to rely, that the transaction would or would not be unconsummated.

Id. at 501.

62. *Id.* at 485, 504-07, 535.

63. Craswell, *Efficient Reliance*, *supra* note 12.

64. *Id.*

have struck if they had thought about it at the time of the promise.⁶⁵ He contends that this would have been that the promise would be always enforceable whenever the promisee's reliance would be efficient, and always unenforceable otherwise. Craswell prefers that courts engage in a case-by-case analysis to determine which of the parties is the lowest-cost risk bearer,⁶⁶ and his detailed analysis of case law leads him to believe that this rule is generally, though not universally, followed.

On the question of how the court can determine the economic efficiency of the promisee's reliance, Craswell argues that reliance on a non-bargain, commercial promise is always efficient when it is expressly encouraged or requested by a promisor (who is presumed to have superior information about the efficiency of reliance).⁶⁷ He contends that it is such reliance that Section 90 ought to and does in fact protect.⁶⁸ But as argued in the preceding section, *all* commercial promises are made to induce reliance. If promisors prefer to make unenforceable, reliance-inducing promises, then courts should not alter their choice by making such promises enforceable. The problem with Craswell's analysis is that it fails to demonstrate that efficient levels of reliance will not be achieved in such cases by performance-reliance alone, i.e., by reliance on a promise that both parties realize is unenforceable.⁶⁹

If, as Craswell maintains, promisors are in the best position to determine the efficiency of enforcement reliance, then evidence of promisor activity in general demonstrates that, with the exception of formal options,⁷⁰ commercial promisors virtually⁷¹ never express an

65. *Id.* at 483-84, 486-87. Craswell's rule is a default rule because it can be overcome by the promisor's expression of an intention to be bound or not bound. He argues that the autonomy of the promisor does not assist in the selection of a default rule: either a rule of liability or non-liability will foist on the promisor an equally voluntary or involuntary legal relation. *Id.* at 485-86.

66. *Id.* at 544-53.

67. *Id.* at 504-07.

68. Craswell, *Efficient Reliance*, *supra* note 12, at 531-36.

69. This omission in the analysis is curious, because Craswell recognizes that unenforceable promises might encourage efficient levels of reliance. Craswell, *Default Rules*, *supra* note 51, at 500 n.30; Craswell, *Efficient Reliance*, *supra* note 12, at 493.

70. Under the Restatement definition, an option contract is an irrevocable offer. SECOND RESTATEMENT, *supra* note 1, § 25. Commercial offers are sometimes made expressly irrevocable, which can be seen as an expression of an intention to be legally bound. Subcontractors' bids are made irrevocable under the principle of promissory estoppel when they induce the general contractor to use them in making a bid. *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958). This rule seems well established today. *Architectural Metal Sys. v. Consolidated Sys.*, 58 F.3d 1227 (7th Cir. 1995); *Percy J. Matherne Contractor v. Grinnell Fire Protection Sys. Co.*, 915 F. Supp. 818 (M.D. La. 1995) (granting summary judgment to plaintiff general contractor), *aff'd mem.*, 102 F.3d 550 (5th Cir. 1996); *Pavel Enters. v. A.S. Johnson Co.*, 674 A.2d 521 (Md.

intention to be legally bound to a promise outside a bargain contract and that when they have an opportunity to express an opinion about enforceability, they usually disclaim liability. If empirical evidence of promisor intention to be bound is superior to speculation about the hypothetical bargains as a guide to the appropriate default rule, then that evidence suggests a default rule of non-liability in the absence of a clear expression of intention to be bound.

In sum, it would appear that Section 90 has not been shown to reduce the costs of contracting by making reliance-inducing promises enforceable even when that reliance is specifically sought by the promisor. The efficiency of enforceability must be determined by the promisor. It is reasonable to assume that any commercial promisor who wants to make an enforceable promise will incur the cost of assuring the promisee of its enforceability. No promisor will ever want to make a promise that is enforceable under Section 90 without expressly assuring the promisee that the promise is enforceable, so as to gain the benefit of enforceability. Thus, contrary to Craswell, I contend that economic policy favors a blanket rule of non-enforceability in the absence of an expression to be legally bound.

III. THE NEW CONSENSUS AND THE DEATH OF RELIANCE

In a recent article, *The Death of Reliance*, Randy Barnett announced that a "new consensus" of contracts scholars has recognized and endorsed a shift in the judicial conception of promissory estoppel.⁷² They have concluded that, despite the language of Section 90, a promisee's actual reliance is no longer necessary to the enforcement of a Section 90 promise. Barnett's announcement of the "death of reliance" alludes to

1996) (adopting the rule and discussing its history and theory); *see also* *Strata Prod. Co. v. Mercury Exploration Co.*, 916 P.2d 822 (N.M. 1996) (holding unilateral contract offer of working interest for drilled well irrevocable through promissory estoppel because of offeree's foreseeable reliance in drilling related well).

The general contractor who seeks to "bid shop" after the award of the prime contract may, however, lose the ability to hold the subcontractor to its bid on grounds of non-reliance. *E.g.*, *Lahr Constr. Corp. v. J. Kozel & Son*, 640 N.Y.S.2d 957 (N.Y. Sup. Ct. 1996) (refusing to hold contractor liable under a theory of promissory estoppel because contractor did not demonstrate reliance on the implied promise in that it sought to negotiate different terms with subcontractor after being awarded prime contract).

71. An expression of intention to be bound occurs occasionally in precontractual agreements such as that discussed *infra* Part IV.D.

72. Barnett, *Death of Reliance*, *supra* note 11, at 522-27. Barnett identified members of the new consensus as himself and Mary Becker, Daniel Farber and John Matheson, Edward Yorio and Steve Thel, Juliet Kostrisky, and Jay Feinman. *Id.*

Grant Gilmore's *The Death of Contract*⁷³ and its provocative thesis that protection of the reliance interest through the use of the new doctrine of promissory estoppel would signal the end of bargain contract and the consideration doctrine.⁷⁴ Gilmore predicted that giving promisees a generalized tort-like remedy would cause contract law to be "reabsorbed" by tort law, from which it had so recently emerged.⁷⁵

The new consensus rejects Gilmore's thesis that Section 90 is a tort-like doctrine intended to compensate disappointed promisees for the costs of reliance on unfulfilled, non-bargain promises.⁷⁶ Instead, it rests on the idea that Section 90 is a contract doctrine and that its rationale lies in the enforcement of promises.⁷⁷ The two most prominent of these theories can be said to locate the critical source of Section 90 obligation in promise and in consent.⁷⁸

73. GILMORE, DEATH OF CONTRACT, *supra* note 1.

74. *Id.* at 87-91. Gilmore suggested the possibility that this might occur, attributing the declaration of the death of contract to unnamed others. *Id.* at 3; *see also* Commonwealth v. Scituate Savings Bank, 137 Mass. 301, 302 (1884) (Holmes, J.) ("It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it."); Note, *Contracts—Promissory Estoppel*, *supra* note 3, at 218 ("The fear that general adoption of the doctrine [of promissory estoppel] would tend to abolish consideration in contract cases is almost universal."). Both of the latter authorities are cited in ROBERT A. HILLMAN & ROBERT S. SUMMERS, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 82 (2d ed. 1992).

75. GILMORE, DEATH OF CONTRACT, *supra* note 1, at 87-91. *See generally* Symposium, *Reconsidering Grant Gilmore's The Death of Contract*, 90 NW. U. L. REV. 1 (1995). Gilmore's view that promissory estoppel sounded in tort rather than in contract remedy was widely held. *See supra* note 17. Barnett criticized Gilmore's "reabsorption" thesis on the ground that neither "contract" nor "tort" was a meaningful category at the time of the rise of the bargain theory of consideration, when the forms of action defined the types of civil obligation. Barnett, *Death of Reliance*, *supra* note 11, at 520. Gilmore, however, seems to have acknowledged this point. GILMORE, DEATH OF CONTRACT, *supra* note 1, at 140 n.228. *But see* W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197 (1990) [hereinafter Slawson, *Role of Reliance*] (criticizing both Gilmore and Barnett as incorrectly labeling reliance-based liability as sounding in tort rather than contract).

76. *See supra* note 17. The "tort or contract" quality of promissory estoppel is relevant to several legal issues. For example, it may determine whether a state may be sued for promissory estoppel in the face of a statute granting it immunity from tort claims. *See, e.g.,* Berg v. State Bd. of Agric., 919 P.2d 254, 259 (Colo. 1996) (holding that whether a claim for promissory estoppel is a tort or contract claim for purposes of the Colorado Governmental Immunity Act must be determined on a case-by-case basis).

77. Yorio and Thel trace the contract approach to Samuel Williston, the Chief Reporter for the First Restatement. Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11.

78. Barnett, *Death of Reliance*, *supra* note 11, at 522-27. Barnett identified as members of the new consensus two additional theorists whose views will not be analyzed

A. Promise Theories

The promise theorists build on earlier views that Section 90 is a pure contract doctrine.⁷⁹ In his 1981 book, *Contract as Promise*, Charles

in this Article:

(1) Juliet P. Kostritsky. See Kostritsky, *A New Theory*, *supra* note 11. Professor Kostritsky argues that Section 90 promises should be enforceable in situations in which the parties face barriers to negotiation of formal, bargain promises. *Id.* at 905. These barriers may arise in the presence of any of three factors: the parties are "enmeshed" in a broader relationship; the parties possess different degrees of status, power or knowledge; or the parties have a relationship of trust or confidence. *Id.* at 906-07, 911-29. She argues that a court should enforce any promise made in such a context that is likely to induce reliance by the promisee that would confer a benefit on the promisor. *Id.* at 946-47. For Kostritsky, the presence of a benefit also manifests "assent" to be bound that substitutes for the usual requirements of formal contract. *Id.* at 947. Kostritsky's position overlaps with Barnett's in this respect, but she does not contend that manifestation of an intention to be bound alone would support enforcement under Section 90, as does Barnett.

It may be that under Kostritsky's scheme, a court would not enforce a Section 90 promise if a bargain contract were feasible, but that is unclear. Her assertion that "barriers" to formal contract exist in, for example, long-term commercial relations among unequal parties is unconvincing, given the large number of formal employment agreements, distributorship agreements, loan agreements, and the like that do exist between such parties.

(2) Jay M. Feinman. See Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 *FORDHAM L. REV.* 303 (1992); Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 *WIS. L. REV.* 1373; Feinman, *Promissory Estoppel and Judicial Method*, *supra* note 2. Jay Feinman is the chief exponent of the relational contract theories of Section 90. Although Feinman has renounced both bargain-promise and Section 90 in favor of a totally relational approach to contract enforcement that is freed of such constrictive concepts as "promise" or "bargain," he suggests that the law should enforce promises that tend to arise out of and foster long-term relations of trust and confidence, and in which formal discrete exchange contracts would not be appropriate. It is unclear from his description whether actual reliance would be essential or even relevant to such enforcement, in part because it is unclear exactly what role legal enforceability should play in commercial relationships under a relational theory.

79. Precursors of the promise theory arguably include both Corbin and Williston. Corbin considered reliance to have been a historic form of consideration that pre-dated bargain theory. See *supra* note 1. In the debates over the First Restatement's version of Section 90, Williston contended that Section 90 was, by definition, contractual because it enforced a promise. *PROCEEDINGS*, *supra* note 2, at 94 (remark of Mr. Williston) ("A contract to my mind is a binding promise, and in the case we are referring to [Johnny and the car], under the stated circumstances, the promise itself is binding."); *id.* at 95, 102, 111-12. On this basis, he reasoned that the remedy for breach should be full expectation damages rather than compensation for reliance losses. *Id.* at 103-04.

Even as he defended the contractual character of Section 90, however, Williston agreed that a Section 90 promise would not become binding until the promisee had actually relied on it. *Id.* at 88. It is also pertinent that Williston named the new doctrine "promissory estoppel" after the tort doctrine of equitable estoppel. *Id.* at 97; Henderson, *Promissory Estoppel*, *supra* note 1, at 376 n.182. "Estoppel" suggests that Section 90's

Fried argued that Section 90 promises were enforced because of the promisor's moral obligation to perform promises rather than because of promisee reliance.⁸⁰ Fried rejected the idea that promises are enforceable in order to protect the reliance interest: "[R]eliance on a promise cannot alone explain its force: There is reliance because a promise is binding, and not the other way around."⁸¹ Fried dismissed Section 90 as "a belated attempt to plug a gap in the general regime of enforcement of promises, a gap left by the artificial and unfortunate doctrine of consideration."⁸²

The first two members of the "new consensus" among Section 90 promise theorists were Daniel Farber and John Matheson.⁸³ Their 1985 article, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*⁸⁴ was based on their analysis of cases dealing with promissory estoppel decided during the preceding decade. They concluded that, despite the text of Section 90, courts actually enforce serious promises made in the course of commercial activity without requiring proof of actual reliance.⁸⁵ They also found that the usual remedy for breach of a Section 90 promise is expectation damages rather than reliance damages.⁸⁶

purpose was the prevention of injustice rather than the creation of a system of intentional contract formation.

In their influential article on the reliance interest in contract damages, Fuller and Perdue speculated that the award of damages measured by the promisee's expectation in cases of promissory estoppel might evidence a "mixed motive" animating the doctrine. Fuller & Perdue, *The Reliance Interest*, *supra* note 23, at 68-70. While reliance was necessary to a finding of liability, the resulting power of enforcement unlocked a latent societal impulse to hold promisors to their bargains, which led to the award of expectation damages. *Id.*

Williston's "enforcement of promises" rationale was drawn into question by the amendments to Section 90 in the Second Restatement, which was published in 1981. The new version deleted Williston's requirement that the foreseeable reliance be "definite and substantial," FIRST RESTATEMENT, *supra* note 1, § 90, and added a sentence providing that the "remedy granted for breach may be limited as justice requires," SECOND RESTATEMENT, *supra* note 1, § 90. This addition was widely interpreted to encourage courts to award reliance damages rather than expectation damages. *See id.* § 90 cmt. d; FARNSWORTH, CONTRACTS, *supra* note 17, § 2.19; Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 137 n.170.

80. *See* CHARLES FRIED, CONTRACT AS PROMISE 19 (1981), *cited in* Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 121.

81. *Id.*

82. *Id.* at 25 (unnumbered footnote "**").

83. *See* Farber & Matheson, *Invisible Handshake*, *supra* note 11.

84. *Id.*

85. *Id.* at 910-14.

86. *Id.* at 909.

The most recent of the promise theorists are Edward Yorio and Steve Thel. In their 1991 article *The Promissory Basis of Section 90*,⁸⁷ they analyzed the precedent cited by the Restatements and others as authority for Section 90 and concluded that promissory estoppel has always been based on promise rather than reliance.⁸⁸ Their analysis of this precedent concluded that expectation damages are routinely awarded under Section 90,⁸⁹ with reliance damages being awarded only in anomalous cases;⁹⁰ that actual reliance is neither necessary nor sufficient for liability,⁹¹ and that only promises that are seriously made are enforced.⁹²

1. DESCRIPTIVE CRITIQUE OF PROMISE THEORY

How closely does Farber and Matheson's description of what courts were doing in 1985 coincide with the current state of the law? To answer this question, I reviewed a sample of recent case law involving the

87. Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11.

88. As Farber and Matheson explain:

Like the rest of contract law, Section 90 is about promises. What distinguishes enforceable promises from unenforceable ones under Section 90 are the proof and quality of the promisor's commitment. Whenever the criteria for a serious commitment by the promisor are satisfied, the promisee obtains full expectancy relief (if feasible) for the breach. Issues of both liability and remedy under Section 90 turn on promise, not reliance.

Id. at 167.

89. *Id.* at 129-51. The authors conclude that in cases in which a reliance measure of damages is used, expectancy damages cannot be calculated. *Id.* at 136.

90. *Id.* at 137-51.

91. *Id.* at 151-60. The authors explain:

A promissory view of Section 90 . . . requires neither actual inducement nor detriment to enforce a promise. So long as the *possibility* of definite and substantial action (or forbearance) by the promisee was conveyed to the promisor, the promise is likely to have been sufficiently well considered to justify enforcement. Although actual inducement and detriment may strengthen the case for legal intervention, a court proceeding from a promissory perspective might enforce the promise in the absence of both.

Id. at 152.

The authors advance the curious argument that reliance cannot be the rationale for Section 90 because there are cases of reliance and no liability. *Id.* at 160. Under the language of Section 90, reliance is a necessary but not sufficient condition to recovery. Only an assumption that only one "principle" can underlie the operation of the statute could make one think that such cases are relevant. See Pham, *Waning*, *supra* note 2, at 1270.

92. Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 162-63 ("What distinguishes enforceable from unenforceable promises is the quality of the commitment made by the promisor. . . . The promisor's contemplation of particular and substantial reliance is important not in and of itself, but because it signals the quality of her commitment.").

doctrine of promissory estoppel. The days are long past when one can lightly undertake to read the entire corpus of promissory estoppel cases, or even those of a decade, as did Farber and Matheson.⁹³ But the case law explosion does make it possible to get a healthy sample from a two year period. Approximately 966 cases that used the term “promissory estoppel” were reported in LEXIS for the years 1995 and 1996 (compared to 540 in the 10 year period studied by Farber and Matheson).⁹⁴ About 800 of these cases involved claims of promissory estoppel, of which about half had some substantive discussion of the doctrine.⁹⁵

In 1985, Farber and Matheson premised their normative argument on four empirical findings:

1. “[P]romissory estoppel is regularly applied to the gamut of commercial contexts.”⁹⁶
2. “[P]romissory estoppel is a primary basis of enforcement,” often applied when there is no barrier to recovery on a breach of contract theory.⁹⁷
3. “[R]eliance plays little role in the determination of remedies,” with courts typically awarding expectation damages or equitable relief such as specific performance or injunction.⁹⁸
4. The “most important finding is the diminished role of reliance in determining liability”; detriment is no longer required for enforceability.⁹⁹

93. Farber and Matheson based their findings on approximately 222 cases, representing all those cases within a 10-year period that had applied Section 90. Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 907 n.14. During that decade, the term “promissory estoppel” appeared in 540 cases. *Id.* A crude measure of the growing size of the body of case law can be obtained from the computerized legal databases, LEXIS and Westlaw. As of April 5, 1997, the total number of state and federal opinions in those databases in which the term “promissory estoppel” appeared was 5,861 (LEXIS) or 5,908 (Westlaw). The total number from January 1, 1985 to that date was 4,544 (LEXIS) or 4,503 (Westlaw).

94. *See supra* note 93.

95. This estimate involves a necessarily subjective assessment of the degree to which the case on appeal raised issues relating to the doctrine of promissory estoppel. I do not offer this survey as any sort of statistical sample.

96. Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 907.

97. *Id.* at 908.

98. *Id.* at 909-10.

99. *Id.* at 910.

These conclusions will be reconsidered in light of the 1995-1996 sample:

1. "[P]romissory estoppel is regularly applied to the gamut of commercial contexts."

If "applied" means "alleged," then this observation has become even more true than when it was made in 1985, to the point at which virtually all the reported cases dealing with Section 90 are commercial cases. Intrafamilial promises and charitable donation cases appear to be growing almost as rare as promises in consideration of marriage. In fact, out of about 966 reported cases in the 1995-1996 period, only one was found to involve a "classic" intrafamilial gift promise.¹⁰⁰ Once a staple of nineteenth-century contracts litigation, and the chief source of hypotheticals considered by the drafters of the First Restatement,¹⁰¹ such cases even now make up a disproportionate percentage of the cases in the typical Contracts casebook.¹⁰² As Stanley Henderson observed in 1969, the virtual extinction of such cases from the appellate landscape implies

100. *Shumate v. Dugan*, 934 S.W.2d 589 (Mo. Ct. App. 1996) (unsuccessful claim of promissory estoppel to enforce oral promise to convey land); *see also* *Weinig v. Weinig*, 674 N.E.2d 991 (Ind. Ct. App. 1996) (declining to enforce under Section 90 a wife's promise not to claim proceeds of winning lottery ticket after divorce, because it did not induce husband to rely). Others have noted the disappearance of family gift cases. *E.g.*, STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 261-62 (abr. ed. Michie Co. 1995) [hereinafter MACAULAY ET AL., *LAW IN ACTION*]. It is interesting to speculate on the causes of the disappearance of conditional gift cases from the litigation landscape of the 90s. Possibilities include the decreasing importance of intergenerational wealth transfers, especially of land, in relation to the wealth generated as income, *see* LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 36-39 (1965), the increased expense of litigation in relation to the value of family gifts, and the impoverishment caused by medical expenses and care for the aged property owner.

Promissory estoppel has begun to appear in claims for child support. *E.g.*, *Wright v. Newman*, 467 S.E.2d 533 (Ga. 1996) (husband who had previously acknowledged paternity in various ways was barred by promissory estoppel from denying paternity in support action); *Guisse v. Robinson*, 555 N.W.2d 887 (Mich. Ct. App. 1996) (same).

101. *See supra* note 2.

102. Most casebooks include several of the following intrafamilial gift or gift-contract cases: *Kirksey v. Kirksey*, 8 Ala. 131 (1845); *Brackenbury v. Hodgkin*, 102 A. 106 (Me. 1917); *Devecmon v. Shaw*, 14 A. 464 (Md. 1888); *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898); *Seavey v. Drake*, 62 N.H. 393 (1882); *Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919); *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917); *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

that policy arguments based on informal, intrafamilial promises are based on a misleading conception of the role of Section 90.¹⁰³

If, however, as is more likely, Farber and Matheson meant that promissory estoppel is "regularly used by courts to impose an obligation" then they were seriously mistaken. It would be no great exaggeration to say that promissory estoppel has had no significant impact on commercial transactions. Though there has been a steep increase in the absolute number of cases involving Section 90 claims, both the number and the percentage that are successful through appeal is exceedingly small. Only a handful of the cases reported in 1995-96 displayed a final judgment favoring the plaintiff in a promissory estoppel claim.¹⁰⁴ The facts in

103. Henderson, *Promissory Estoppel*, *supra* note 1, at 352 ("[I]f the gratuitous promise is no longer relevant to the theory of Section 90, policy considerations developed in relation to the conventional idea of promissory estoppel will have to be carefully examined before Section 90 is made a vehicle for relieving injustices occasioned by business bargains.").

104. See *Cyberchron Corp. v. Calldata Sys. Dev.*, 47 F.3d 39 (2d Cir. 1995) (remanding for recalculation of damages); *Robeson v. Midwest Ford, Inc.*, No. 94-3405, 1995 U.S. App. LEXIS 24641 (6th Cir. Aug. 17, 1995); *Percy J. Matherne Contractor v. Grinnell Fire Protection Sys. Co.*, 915 F. Supp. 818 (M.D. La. 1995); *Dean Witter Reynolds, Inc. v. Continental Cas. Co.*, 897 F. Supp. 142 (S.D.N.Y. 1995); *Krauth v. Executive Telecard, Ltd.*, 890 F. Supp. 269 (S.D.N.Y. 1995); *Meaney v. Connecticut Hosp. Ass'n*, No. 35 52 65, 1996 Conn. Super. LEXIS 1440 (Conn. Super. Ct. May 31, 1996); *Rooney v. Paul D. Osborne Desk Co.*, 645 N.E.2d 50 (Mass. App. Ct. 1995); *Royal Fixture Co. v. Phoenix Leasing*, 891 S.W.2d 553 (Mo. Ct. App. 1995); *Howard v. Kluehnert*, No. 95APE09-1197, 1996 Ohio App. LEXIS 1323 (Ohio Ct. App. Mar. 28, 1996); *Lancaster Brokers v. Kull*, No. 94 CA 59, 1995 Ohio App. LEXIS 3568 (Ohio Ct. App. July 27, 1995); *Villagran v. Central Ohio Bus. Servs.*, No. 94APE08-1267, 1995 Ohio App. LEXIS 2366 (Ohio Ct. App. June 8, 1995); *Central Texas Micrographics v. Leal*, 908 S.W.2d 292 (Tex. Ct. App. 1995); *Clement v. Woodstock Resort Corp.*, 687 A.2d 886 (Vt. 1996).

See also *Brookside Farms v. Mama Rizzo's, Inc.*, 873 F. Supp. 1029 (S.D. Tex. 1995) (granting summary judgment for plaintiff enforcing oral contract modification on promissory estoppel as alternative ground); *Wright v. Newman*, 467 S.E.2d 533 (Ga. 1996) (estopping a denial of paternity); *Guise v. Robinson*, 555 N.W.2d 887 (Mich. Ct. App. 1996) (same); *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 532 N.W.2d 594 (Minn. Ct. App. 1995) (estopping retirement fund from refusing to permit employee to purchase service credits that it had promised him he could purchase); *Pilot Oil Corp. v. Ohio Dep't of Transp.*, 656 N.E.2d 1379 (Ohio Ct. App. 1995) (holding state estopped by its prior approval of a sign); *Jones v. Best*, No. 14634-1-III, 1996 Wash. App. LEXIS 704 (Wash. Ct. App. Dec. 3, 1996) (holding broker who offered to take reduced fee estopped under Section 90 from claiming full fee).

This is consistent with the assessments reported by other commentators. See *supra* note 18. While it is possible that plaintiffs succeed in promissory estoppel claims that did not result in reported opinions, it is unlikely that there are many unreported decisions for plaintiff because it is reasonable to assume that defendants would appeal a comparable number of plaintiffs' judgments if cases were being decided in plaintiffs' favor at the trial

almost all of those cases would probably have supported a breach of contract claim as well.¹⁰⁵ This accords with other studies of the success rates of promissory estoppel claims going back to 1981.¹⁰⁶

2. "[P]romissory estoppel is a primary basis of enforcement," often applied when there is no barrier to recovery on a breach of contract theory.

This observation is no longer valid. In most jurisdictions, promissory estoppel is subordinate to the doctrine of bargain contract.¹⁰⁷ Many jurisdictions have developed a rule under which the existence of a bargain contract concerning a subject automatically bars any claim of promissory estoppel relating to the same subject.¹⁰⁸ Even in

court level.

105. *Robeson v. Midwest Ford, Inc.*, No. 94-3405, 1995 U.S. App. LEXIS 24641 (6th Cir. Aug. 17, 1995) (employer's express promise of permanent employment would apparently justify an express contract); *Dean Witter Reynolds, Inc. v. Continental Cas. Co.*, 897 F. Supp. 142 (S.D.N.Y. 1995) (defendant's purchase order would apparently justify a claim of breach of contract to purchase stocks); *Krauth v. Executive Telecard, Ltd.*, 890 F. Supp. 269 (S.D.N.Y. 1995) (granting summary judgment to plaintiff on both express contract and promissory estoppel grounds in action to enforce written settlement agreement); *Rooney v. Paul D. Osborne Desk Co.*, 645 N.E.2d 50 (Mass. App. Ct. 1995) (claim of employee compensation based on corporate resolution apparently justified express contract remedy); *Royal Fixture Co. v. Phoenix Leasing*, 891 S.W.2d 553, 555 n.3 (Mo. Ct. App. 1995) (enforcing promise to pay for equipment furnished to third party lessee, and electing not to review alternative claim of breach of contract because promissory estoppel supports the judgment); *Lancaster Brokers v. Kull*, No. 1994 CA 59, 1995 Ohio App. LEXIS 3568 (Ohio Ct. App. July 27, 1995) (affirming a general jury verdict in which promissory estoppel was one of four contract-related claims); *Villagran v. Central Ohio Bus. Servs.*, No. 94APE08-1267, 1995 Ohio App. LEXIS 2366 (Ohio Ct. App. June 8, 1995) (affirming judgment on grounds of promissory estoppel as well as express and implied contract); *Central Texas Micrographics v. Leal*, 908 S.W.2d 292 (Tex. Ct. App. 1995) (holding that promissory estoppel was alternative ground to express contract in affirming judgment in employee's claim for compensation for services rendered); *Clement v. Woodstock Resort Corp.*, 687 A.2d 886 (Vt. 1996) (affirming general verdict for plaintiff making claims of promissory estoppel and breach of contract); *Jones v. Best*, No. 14634-1-III, 1996 Wash. App. LEXIS 704 (Wash. Ct. App. Dec. 3, 1996) (holding broker estopped from claiming full commission when broker agreed to accept less to induce seller to sell). This too is consistent with other surveys of promissory estoppel cases. See *Pham, Waning*, *supra* note 2, at 1273-76.

106. See *supra* note 21.

107. *Pham, Waning*, *supra* note 2.

108. *Terry Barr Sales Agency v. All-Lock Co.*, 96 F.3d 174 (6th Cir. 1996); *Tiberi v. CIGNA Corp.*, 89 F.3d 1423 (10th Cir. 1996) (New Mexico law); *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1995); *Advanced Plastics Corp. v. White Consol. Indus.*, No. 93-2155, 1995 U.S. App. LEXIS 1047 (6th Cir. Jan. 18, 1995) (affirming summary judgment against terminated supplier, and holding promissory

jurisdictions in which a Section 90 claim is not barred by such a rule, promissory estoppel is almost always displaced by inconsistent bargain contract behavior. Thus, for example, a formal written contract cannot usually be overcome by a subsequent, reliance-inducing promise,¹⁰⁹

estoppel claim not maintainable because both parties admit the existence of an express contract); *Bellairs v. Coors Brewing Co.*, 907 F. Supp. 1448 (D. Colo. 1995) (Colorado law); *Jacobs v. Central Transp., Inc.*, 891 F. Supp. 1088 (E.D.N.C. 1995) (written lease bars tenant's promissory estoppel claim); *Iversen Baking Co. v. Weston Foods*, 874 F. Supp. 96 (E.D. Pa. 1995) (Pennsylvania law); *Avedas, Inc. v. Intouch Group*, No. 94 C 6923, 1995 U.S. Dist. LEXIS 5135 (N.D. Ill. Apr. 18, 1995) (holding that plaintiff can plead Section 90 in the alternative to express contract, but can recover under Section 90 only if the court finds no express contract); *Don Lark v. Post Newsweek Stations Conn.*, No. CV94 070 53 26, 1995 Conn. Super. LEXIS 2332 (Conn. Super. Ct. Aug. 9, 1995) (written employment agreement bars Section 90 claim); *Franklin Outdoor Adver. Co. v. Hovanetz*, No. C8-95-736, 1995 Minn. App. LEXIS 1485 (Minn. Ct. App. Dec. 5, 1995); *Jackson v. State Farm Ins. Cos.*, No. C2-95-764, 1995 Minn. App. LEXIS 1301 (Minn. Ct. App. Oct. 17, 1995) (written employment agreement); *Kaiser v. U.S. Transformer*, No. C8-95-252, 1995 Minn. App. LEXIS 1203 (Minn. Ct. App. Sept. 19, 1995) (no estoppel claim where jury found unilateral contract formed); *Bichsel v. Minnesota*, No. C1-95-240, 1995 Minn. App. LEXIS 955, at *18 (Minn. Ct. App. July 25, 1995) (Section 90 is "wholly inapplicable" if there is an actual contract); *Banbury v. Omnitrition Int'l*, 533 N.W.2d 876 (Minn. Ct. App. 1995) (no Section 90 claim for wrongful termination of a distributorship agreement if the written contract is terminable at will); *cf. Gomez v. Martin Marietta Corp.*, 50 F.3d 1511 (10th Cir. 1995) (under Colorado law, an at-will employee may prove that promises made in an employee handbook became binding on the employer either as unilateral contracts or under the doctrine of promissory estoppel); *Royal Fixture Co. v. Phoenix Leasing*, 891 S.W.2d 553 (Mo. Ct. App. 1995) (affirming judgment enforcing under Section 90 a promise to pay for equipment furnished to a lessee, and stating there is no need to review the claim for breach of contract); *Peck v. Imedia, Inc.*, 679 A.2d 745 (N.J. Super. Ct. App. Div. 1996) (holding that alleged reliance on promise of at-will employment by terminating business and preparing to move to employer's location precludes summary judgment for employer); *Housing Vt. v. Goldsmith & Morris*, 685 A.2d 1086 (Vt. 1996). *But see Architectural Metal Sys. v. Consolidated Sys.*, 58 F.3d 1227 (7th Cir. 1995) (permitting alternative claims of contract by offer and acceptance and under Section 90 contract, based on a general contractor's use of a subcontractor's bid, but not discussing displacement of the latter theory); *Percy J. Matherne Contractor v. Grinnell Fire Protection Sys. Co.*, 915 F. Supp. 818, 821 (M.D. La. 1995) (granting summary judgment for plaintiff on promissory estoppel claim and finding it unnecessary to consider whether plaintiff also had a claim for breach of contract).

Under Texas law, promissory estoppel cannot create affirmative contract rights in the absence of contract, but can bar a party from pleading that an existing contract is invalid or unenforceable. *Oliver Resources PLC v. International Fin. Corp.*, 62 F.3d 128, 131 (5th Cir. 1995); *Bravo v. Evans*, No. 01-94-00696-CV, 1995 Tex. App. LEXIS 999 (Tex. Ct. App. May 11, 1995) (holding that plaintiff can enforce Section 90 promise where written earnest money contract was unenforceable).

109. *Adiel v. Coca-Cola Bottling Co.*, No. 95 Civ. 0725 (WK), 1995 U.S. Dist. LEXIS 13141 (S.D.N.Y. Sept. 13, 1995) (holding that express contract clause permitting termination of distributor precludes reasonable reliance on oral promise of non-

whereas a subsequent, formal contract term will usually overcome a prior, reliance-inducing promise.¹¹⁰

termination). The following cases dismissed Section 90 claims as being inconsistent with disclaimers found in employment agreements or employee handbooks, even where the promise came after the disclaimer: *Vana v. Mallinckrodt Med., Inc.*, No. 94-3424, 1995 U.S. App. LEXIS 35488 (6th Cir. Nov. 8, 1995) (enforcing handbook disclaimer); *Backlund v. Gates Corp.*, 130 Lab. Cas. (CCH) ¶ 57,972 (10th Cir. 1995) (employee signed disclaimer); *Anderson v. Premier Indus. Corp.*, No. 94-3454, 1995 U.S. App. LEXIS 23153 (6th Cir. Aug. 7, 1995) (enforcing handbook disclaimer); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896 (3d Cir. 1995) (holding that oral promise could not modify written benefit plan); *Hatfield v. Board of County Comm'rs*, 52 F.3d 858, 865 (10th Cir. 1995) ("[A] conspicuous and unambiguous disclaimer [that employment is at-will] make[s] any reliance on the subsequent statements of the employer unreasonable.") (quoting *Lincoln v. Wackenhut Corp.*, 867 P.2d 701, 703 (Wyo. 1994)) (last alteration in original); *Lawson v. Science Applications Int'l Corp.*, 894 F. Supp. 378 (D. Colo. 1995) (signed disclaimer); *Duncan v. St. Joseph's Hosp. & Med. Ctr.*, 903 P.2d 1107 (Ariz. Ct. App. 1995); *Garmarker v. Sterling Elec. Constr. Co.*, No. C4-95-1205, 1995 Minn. App. LEXIS 1304 (Minn. Ct. App. Oct. 17, 1995) (employee manual disclaimer, no collateral promise shown); *Clark v. Washington Univ.*, 906 S.W.2d 789 (Mo. Ct. App. 1995) (holding that letter appointing teacher to position, unlike letters in earlier years, did not expressly appoint for a one year period, and thus changed employment to at-will); *McKeown-Brand v. Trump Castle Hotel & Casino*, 626 A.2d 425 (N.J. 1993) (declining to enforce oral promise to rehire after maternity leave because of previously delivered employee manual making employment at-will); *Chasko v. Ellwood Eng'ng Castings Co.*, 675 N.E.2d 494 (Ohio Ct. App. 1996); *Silcott v. Rio Linda Chem. Co.*, No. 95APE11-1512, 1996 Ohio App. LEXIS 2312 (Ohio Ct. App. June 4, 1996); *Latimore-DeBose v. BVM, Inc.*, No. 69439, 1996 Ohio App. LEXIS 1425 (Ohio Ct. App. Apr. 4, 1996); *Day v. Stanley Elec. U.S. Co.*, No. CA95-08-029, 1996 Ohio App. LEXIS 76 (Ohio Ct. App. Jan. 16, 1996); *Loghry v. Unicovert Corp.*, 927 P.2d 706 (Wyo. 1996) (holding an oral promise not to terminate employee for cooperating in internal investigation unenforceable because employee had signed disclaimer providing that her employment was at-will and that no other employee had authority to alter it).

But see *Orback v. Hewlett-Packard Co.*, 131 Lab. Cas. (CCH) ¶ 58,101 (D. Colo. 1995) (disclaimer in manual can be overcome only if employer otherwise expresses intention to be bound to permanent employment, judged from employee's perspective); *Danko v. MBIS Inc.*, No. 68131, 1995 Ohio App. LEXIS 4330 (Ohio Ct. App. Sept. 28, 1995) (representations made after employee receives handbook containing disclaimer could create liability under Section 90 if employer assurances negate disclaimer).

110. *Rolscreen Co. v. Pella Prods.*, 64 F.3d 1202 (8th Cir. 1995) (holding that subsequent written franchise agreement supersedes prior oral promise not to terminate; promisor could not foresee reliance after the written contract); *Coll v. PB Diagnostic Sys.*, 50 F.3d 1115 (1st Cir. 1995) (holding that an oral promise superseded by a subsequent written employment agreement could not be reasonably relied upon); *Barnes v. Burger King Corp.*, 932 F. Supp. 1420 (S.D. Fla. 1996) (holding that subsequent written franchise agreement giving franchisor discretion in opening new stores made reliance on prior oral and written assurances of non-encroachment unreasonable as a matter of law); *Duncan v. St. Joseph's Hosp. & Med. Ctr.*, 903 P.2d 1107 (Ariz. Ct. App. 1995) (holding that an "at-will" disclaimer contained in an employer's handbook supersedes any implied contract resulting from the employee's prior fourteen year history

Even non-contractual communications that envision a future bargain contract will prevent the formation of a Section 90 contract. For example, a prior manifested refusal to be bound to an express, bargain contract can often preclude creation of a subsequent Section 90 contract.¹¹¹ Similarly, a written offer for a bargain contract that contains a statement that it will not be binding until signed by both parties will prevent the subsequent formation of an oral Section 90 contract concerning the same subject matter.¹¹² Although such an offer is not a contract, only a statement of intention, it has sufficient authority to bind

of employment with the same employer); *Clark v. Washington Univ.*, 906 S.W.2d 789 (Mo. Ct. App. 1995) (finding that letter appointing plaintiff to position, unlike letters in preceding years, did not expressly appoint plaintiff for one year, and so created at-will agreement); *Ed Schory & Sons v. Francis*, 662 N.E.2d 1074, 1080 (Ohio 1996) (barring lender liability promissory estoppel claim under parol evidence rule, where loan agreement was subsequently integrated); *McCullough v. Avon Lake McDonald's*, No. 95CA006066, 1995 Ohio App. LEXIS 3529 (Ohio Ct. App. Aug. 16, 1995); *Rasberry v. Mansfield-Richland, Morrow Policy Comm.*, No. 94 CA 61, 1995 Ohio App. LEXIS 3647 (Ohio Ct. App. May 9, 1995) (oral promise superseded by subsequent written employment agreement).

Contra *Brusilovsky v. Figgie Int'l*, No. 94 C 1506, 1995 U.S. Dist. LEXIS 7341 (N.D. Ill. May 25, 1995) (holding that employee lured away from former job by oral promise of non-terminable employment acquired rights upon reliance which were not lost when employee entered written at-will employment agreement).

111. *Kimzey III, Inc. v. Blockbuster Music Retail*, No. 94-1528, 1995 U.S. Dist. LEXIS 19680 (C.D. Ill. June 2, 1995) (finding reliance on oral promise unreasonable as a matter of law where proposed written contract said that it was not effective until signed); *James Eckmann Assocs. v. ABC Int'l Traders*, No. 95 C 650, 1995 U.S. Dist. LEXIS 7281 (N.D. Ill. May 24, 1995) (rejecting claim of plaintiff who failed to demonstrate a reasonable belief in defendant's oral representations that contract had been accepted where written agreement required signature as prerequisite to acceptance); *see also* *Purnell, Inc. v. Thyssen*, No. 01-95-00125-CV, 1995 Tex. App. LEXIS 1483 (Tex. Ct. App. July 6, 1995) (concluding that plaintiff seeking injunction had no probable right to recover on oral promise of confidentiality of trade secret where promisor had refused to sign written confidentiality contract). *But cf.* *Michael K. Sutley, P.A. v. Selchow*, No. C9-95-860, 1996 Minn. App. LEXIS 4 (Minn. Ct. App. Jan. 2, 1996) (holding that plaintiff reasonably relied on defendant's promise to reduce oral agreement to writing and to sign it; defendant estopped from pleading statute of frauds).

112. *Triax Pacific, Inc. v. American Ins. Co.*, No. 94-4091, 1995 U.S. App. LEXIS 31097 (10th Cir. Nov. 2, 1995) (stating that a promise cannot create liability under Section 90 if it is made in the course of negotiating a written contract); *HMS Property Mgmt. Group v. Miller*, Nos. 94-3668 to -3669, 1995 U.S. App. LEXIS 35116 (6th Cir. Oct. 31, 1995) (holding that where parties contemplate that a contract modification must be approved in a signed writing, reliance on oral modification is unjustifiable); *Puri v. Blockbuster Music Retail*, No. 95-C-50018, 1995 U.S. Dist. LEXIS 18819 (N.D. Ill. Dec. 20, 1995) (discussed *infra* Part IV.B); *W.R. Grace & Co.-Conn. v. Taco-Tico Acquisition Corp.*, 454 S.E.2d 789 (Ga. Ct. App. 1995) (concluding that reliance on oral promises was unreasonable as a matter of law in face of language in letter of intent making it non-binding).

both of the parties so as to prevent a subsequent, superseding oral promise under Section 90.

The few cases that permit recovery under Section 90 also often emphasize its subordinate role. Thus, in *Neiss v. Ehlers*,¹¹³ the court affirmed a judgment for plaintiff under Section 90, in the course of which it characterized promissory estoppel as operating only in the interstices of contract law:

It would be a *nonsequitur* to read the cases that require promissory estoppel to be asserted in the context of a breach of contract claim as meaning that promissory estoppel cannot be a basis for relief within the claim, independently of any other contract remedies; promissory estoppel can *only* become necessary as a remedy for an unperformed promise *if* no traditional contractual remedy is available for the nonperformance.¹¹⁴

Most promissory estoppel claims are closely associated with, and are joined with, counts alleging breach of express or implied contract. Over half of the cases examined involved the termination of an at-will relationship (such as employment or franchise). More than half of the rest involved the failure to complete a negotiated deal (such an acquisition, loan, or franchise). The claim of promissory estoppel was in almost all these cases joined with a claim of breach of contract or, in the employment context, a claim of statutory violation. The breach of contract claim was typically vulnerable either to a Statute of Frauds defense or to a defense based on disclaimers contained in documents binding the parties. The number of "pure" promissory estoppel claims was thus exceedingly rare. And as noted above, in the vast majority of the promissory estoppel claims that were joined with other claims, if the facts had warranted recovery on the promissory estoppel claim, they would also have established the contract claim.¹¹⁵ Promissory estoppel thus does not provide a significant additional source of promissory liability.

The subordination of Section 90 to formal contract in the business world, while inconsistent with promise theory, is consistent with a central

113. 899 P.2d 700 (Or. Ct. App. 1995).

114. *Id.* at 706.

115. See *supra* note 105. In the employment termination context, for example, the existence of a sufficiently clear promise of continued employment followed by the employee's performance would give rise to a claim of contract implied in fact or of unilateral contract. For a rare example of a successful claim, see *Brown v. General Tire*, No. 17161, 1996 Ohio App. LEXIS 767 (Ohio Ct. App. Feb. 28, 1996).

thesis of this article: legally aware, commercial actors prefer formal contract as the exclusive mode of creating enforceable obligations. The subordination of promissory estoppel to formal, bargain contract reflects the preference of commercial promisors and promisees for certainty and flexibility.¹¹⁶

3. "[R]eliance plays little role in the determination of remedies," with courts typically awarding expectation damages or equitable relief such as specific performance or injunction.

While much of the evidence is equivocal, contemporary case law moderately supports this conclusion. Although plaintiffs rarely succeed, when they do they can recover expectation damages.¹¹⁷ As Farber and Matheson acknowledged, however, in commercial cases the reliance and expectation interests often converge.¹¹⁸ a court that appears to be awarding expectation damages may be intending to award reliance damages and vice versa.¹¹⁹ In the most common form of promissory estoppel cases, which involve wrongful termination of at-will contractual

116. Goetz & Scott, *Enforcing Promises*, *supra* note 16 (explaining that commercial actors prefer to incur the risk of non-performance until the deal is sufficiently clear to shift that risk to the promisor via formal contract).

117. E.g., *United Artists Theatre Circuit v. Monarch, Inc.*, Nos. 94-2155, 95-6894, 1996 U.S. Dist. LEXIS 18180 (E.D. Pa. Dec. 6, 1996); *Upsher-Smith Lab. v. Mylan Lab.*, Civ. No. 3-94-1148, 1996 U.S. Dist. LEXIS 16715 (D. Minn. Feb 28, 1996) (court had discretion to award consequential damages and lost profits); *Lancaster Brokers v. Kull*, No. 1994 CA 59, 1995 Ohio App. LEXIS 3568 (Ohio Ct. App. July 27, 1995) (recovery of real estate brokerage fee). The ability to obtain specific performance is less well-settled. Compare *Giordano v. Markovitz*, 531 N.W.2d 815 (Mich. Ct. App. 1995) (indicating in dictum that specific performance is available when necessary to avoid injustice), with *Broward County v. Conner*, 660 So.2d 288 (Fla. Dist. Ct. App. 1995) (implying that specific performance of promise enforceable under Section 90 is not available).

118. Farber and Matheson, *Invisible Handshake*, *supra* note 11, at 909 n.24; see also Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 147-48, 150. In competitive markets, by relying on the promisor, the promisee may lose the opportunity to obtain an equivalent contract performance from another promisor. Fuller & Perdue, *The Reliance Interest*, *supra* note 23, at 60-62, 71-75. "[I]n a hypothetical society in which all values were available on the market and where all markets were 'perfect' in the economic sense. . . there would be no difference between the reliance interest and the expectation interest." *Id.* at 62.

119. *Percy J. Matherne Contractor v. Grinnell Fire Protection Sys. Co.*, 915 F. Supp. 818, 824 (M.D. La. 1995) (reliance interest equivalent to expectation interest in action by general contractor seeking to enforce bid under doctrine of promissory estoppel).

relationships, reliance damages are awarded because expectation damages would be speculative.¹²⁰

It is also notable that some courts justify findings of liability under Section 90 by their ability to limit recovery to reliance.¹²¹ For example, in *Neiss v. Ehlers*¹²² the court held that a plaintiff who had entered an unenforceable "agreement to agree" to a stock purchase could recover reliance damages incurred when she joined the defendants' business in reliance on the proposed deal.¹²³ The court affirmed that an award under Section 90 is intended to compensate for loss rather than to provide expectation damages and that the flexible remedial provisions of Section 90 permitted recovery even when promises were too indefinite to create a contract.¹²⁴

120. Farber & Matheson, *Invisible Handshake*, *supra* note 11; see also Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 147-48. The cases in the sample permitted recovery of reliance damages in such situations, emphasizing the flexibility of the Section 90 remedy. *E.g.*, *Oscar Prods. v. Zacharius*, 893 F. Supp. 250 (S.D.N.Y. 1995) (denying summary judgment for defendant, opining that plaintiff could recover expenses incurred in writing a novel under oral promise of indefinite duration); *Pavlisca v. Bridgeport Hosp.*, No. CV91 20 01 74 S, 1996 Conn. Super. LEXIS 1945 (Conn. Super. Ct. July 25, 1996) (awarding reliance damages in lieu of jury's award of expectation damages for breach of promise of employment contract of indefinite duration); *Haas Carriage v. Berna*, 651 N.E.2d 284 (Ind. Ct. App. 1995) (limiting damages to reliance losses for breach of promise of indefinite tenure); *Gorham v. Benson Optical*, 539 N.W.2d 798 (Minn. Ct. App. 1995) (reversing summary judgment for defendant and limiting at-will employee to reliance losses in claim for breach of oral contract); *Blatnick v. Sheller-Globe Corp.*, No. 69026, 1996 Ohio App. LEXIS 1205, at *7-8 (Ohio Ct. App. Mar. 28, 1996) (limiting damages to reliance losses caused by defendant's breach of promise to promote plaintiff, plus differential between actual and promised pay until plaintiff was terminated).

121. See, *e.g.*, *Romberger v. VFW Post 1881*, 918 P.2d 993, 995 (Wyo. 1996) ("Recovery is not a matter of contract, but is predicated on the promisee's change in position The amount of recovery is a question intertwined with the equities of the transaction, necessarily creating a policy question to be decided by the court in the exercise of its discretion.") (citation omitted).

122. 899 P.2d 700 (Or. Ct. App. 1995).

123. The plaintiff, an optician, had joined an optical business under a letter agreement agreeing to an annual salary and stating an intention that as further consideration for her services, the plaintiff would receive a one-third interest in the business "as soon as it can be practically arranged." *Id.* at 702. The plaintiff moved to Oregon and worked for more than two years. *Id.* She then left the business when the parties were unable to agree on the terms of the ownership interest and brought an action alleging breach of the agreement to convey the ownership. *Id.* at 702-03.

124. The *Neiss* court explained that liability under promissory estoppel as a remedy for breach of promises that are too indefinite for contract is appropriate because promissory estoppel would not generally entail "enforcement" of the same kind or extent that the traditional remedies provide. . . . [P]romissory estoppel remedies are more flexible in nature than contract remedies and are aimed at

In *Cyberchron Corp. v. Calldata Systems Development*,¹²⁵ the court affirmed a judgment of reliance damages in an action by a manufacturer of computer equipment against a potential buyer. The parties had been unable to agree to material provisions in the purchase contract relating to the characteristics of the goods, but the buyer had repeatedly urged the manufacturer to begin production of the equipment and had assured it that the contract would ultimately be signed. The seller's reliance on these assurances gave rise to liability under Section 90 when the buyer ultimately declined to enter the contract. The seller sought recovery of its costs of production rather than its benefit of the bargain, and the court awarded its expenses of production.¹²⁶

Neiss and *Cyberchron* suggest that, although a court has the authority to award expectation damages in a Section 90 case, a finding of liability under Section 90 may well depend on a plaintiff's willingness to limit her claim to her reliance losses.

4. *The "most important finding is the diminished role of reliance in determining liability"; detriment is no longer required for enforceability.*

The most important of Farber and Matheson's findings is no longer true.¹²⁷ A legion of unhappy plaintiffs can bear witness to the continued vitality of the actual reliance requirement, having discovered that a commercial promise is not alone sufficient to ground a claim under Section 90.¹²⁸ Not a single one of the surveyed opinions adopts Farber

compensating the promisee for damages that result from actions in reliance on the promise, rather than providing comprehensive contract relief for the breach of the indefinite promise itself.

Id. at 707.

125. 47 F.3d 39 (2d Cir. 1995).

126. The appellate court did remand for further findings as to the amount of overhead to be awarded under this measure. *Id.* at 46.

127. If indeed it ever was. Very little authority was offered for this amazing claim.

128. Plaintiffs failed in various ways to establish that the promise actually induced detrimental reliance:

- (1) *Failure to plead actual reliance*: *Sadowski v. Technical Career Insts., Inc.*, No. 93 Civ. 455 (PKL), 1995 U.S. Dist. LEXIS 13262 (S.D.N.Y. July 25, 1995) (dismissing claim where actual reliance not pleaded); *Michaelian v. State Compensation Ins. Fund*, 58 Cal. Rptr. 2d 133, 145-46 (Cal. Ct. App. 1996) (dismissing claim because no reliance pled beyond delay in service of process in a bad faith action without merit).
- (2) *Failure to introduce proof of actual reliance*: *Ectel Corp. v. U.S. Robotics*, No. 95-16732, 1996 U.S. App. LEXIS 33688 (9th Cir. Dec. 24, 1996); *Boone v. Federal Express Corp.*, 59 F.3d 84, 86 (8th Cir. 1995) (affirming

summary judgment against employee who produced no evidence of reliance on employer's promise of permanent employment); *Stewart v. Whitmire Distrib. Corp.*, No. 94-1096, 1995 U.S. App. LEXIS 9544 (10th Cir. Apr. 26, 1995); *Pitak v. Bell Atl. Network Servs.*, 928 F. Supp. 1354 (D.N.J. 1996) (no clear promise or reliance proved); *see also* *Grayboyes v. General Am. Life Ins. Co.*, No. 92-2515, 1995 U.S. Dist. LEXIS 4233 (E.D. Pa. Mar. 31, 1995) (no proof).

- (3) *Proving reliance that preceded the promise rather than followed it:* *Cyberchron Corp. v. Calldata Sys. Dev.*, 47 F.3d 39 (2d Cir. 1995) (denying recovery for amounts spent before the promise); *Vana v. Mallinckrodt Med., Inc.*, No. 94-3424, 1995 U.S. App. LEXIS 35488 (6th Cir. Nov. 8, 1995); *McKenny v. John V. Carr & Son*, 922 F. Supp. 967 (D. Vt. 1996) (no detriment shown where alleged reliance in transferring stock preceded employment promise); *Diehl v. Twin Disc, Inc.*, No. 94 C 50031, 1996 U.S. Dist. LEXIS 4117 (N.D. Ill. Apr. 2, 1996) (employer's alleged promise was made in an exit interview after plaintiffs had already decided to retire); *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130 (Alaska 1996) (plaintiff had already disclosed his idea to defendant at the time of the promise of employment); *Rothman v. Pratt & Whitney Aircraft*, No. CV 44 99 14, 1995 Conn. Super. LEXIS 518 (Conn. Super. Ct. Feb. 7, 1995) (plaintiff admitted that he had planned to move before receiving job offer); *Struck v. Hackett*, 668 A.2d 411 (Me. 1995) (no reliance in leaving prior job because employee left before employer made promise to hire); *Martin v. Huntington Nat'l Bank*, No. L-95-077, 1995 Ohio App. LEXIS 5051 (Ohio Ct. App. Nov. 17, 1995) (no reliance in accepting job offer where plaintiff was being relocated anyway); *Paolucci v. Robinson Mem'l Hosp.*, No. 94-P-0022, 1995 Ohio App. LEXIS 886 (Ohio Ct. App. Mar. 10, 1995) (no reliance in taking job because employee had already taken job when employer made promise).
- (4) *The promise was withdrawn before reliance occurred:* *Variety Children's Hosp. v. Century Med. Health Plan*, 57 F.3d 1040 (11th Cir. 1995) (promisor withdrew promise to cover treatment before treatment was given); *Properties Dev. v. Sto-Kent Lanes*, No. 17059, 1995 Ohio App. LEXIS 2169 (Ohio Ct. App. May 24, 1995) (promisor revoked oral promise to contribute to cost of constructing road before plaintiff relied).
- (5) *The promisor indicated that it would not perform before reliance occurred:* *King v. Nevada Elec. Inv. Co.*, No. 94-4122, 1995 U.S. App. LEXIS 15369 (10th Cir. June 21, 1995) (reliance unreasonable after parties disagreed); *Coll v. PB Diagnostic Sys.*, 50 F.3d 1115 (1st Cir. 1995) (faced with a conflict between oral promises and written agreement, a reasonable person does not rely on either but gets additional assurances); *Williams v. Pacific Maritime Ass'n*, No. 93-56287, 1995 U.S. App. LEXIS 5188 (9th Cir. Mar. 15, 1995) (notice of dispute makes reliance unreasonable without independent inquiry); *Grayboyes v. General Am. Life Ins. Co.*, No. 92-2515, 1995 U.S. Dist. LEXIS 4233 (E.D. Pa. Mar. 31, 1995) (no reliance on promise to pay insurance benefits where plaintiff purchased house after learning that claim would be denied).
- (6) *Promisee had no alternative to the reliance action taken:* *Shenker v. Lockheed Sanders, Inc.*, 919 F. Supp. 55 (D. Mass. 1996) (no reliance in forbearing to apply for a position that plaintiff could not have obtained because of lack of

qualifications); *Miyano Mach. USA v. Dusan Zonar, L&D Mach.*, No. 92 C 2385, 1995 U.S. Dist. LEXIS 890 (N.D. Ill. 1995) (plaintiff's payment of promissory note was not detrimental reliance on defendant's promise, because plaintiff did not show that it could have done anything else than pay the note); *Schleicher v. Alliance Corporate Resources*, Nos. 95APE03-311 to -312, 1995 Ohio App. LEXIS 5405 (Ohio Ct. App. Dec. 7, 1995) (reliance is a question of fact depending in part on what alternatives plaintiff had); *see also Moore v. Ford Motor Co.*, 901 F. Supp. 1293 (N.D. Ill. 1995) (holding that on remand, plaintiff seeking to enforce promise of distributorship and alleging reliance in forgoing obtaining competing distributorship must demonstrate that it would have qualified for and been offered the alternative).

- (7) *The alleged reliance constituted performance of a pre-existing duty under a contract*: *Thanksgiving Tower Partners v. Anros Thanksgiving Partners*, 64 F.3d 227 (5th Cir. 1995) (plaintiff was contractually obligated to establish letter of credit at the time of defendant's alleged promise not to draw on it); *FDIC v. Patel*, 46 F.3d 482 (5th Cir. 1995) (plaintiff was already contractually committed to post letter of credit at time of beneficiary's alleged promise not to draw on it); *Baker v. Pease Co.*, No. 89-3985, 1995 U.S. App. LEXIS 550 (6th Cir. Jan. 9, 1995) (merely continuing to work at at-will job was not consideration for employer's promise to modify it to permanent employment and did not constitute reliance on the promise); *Tractor & Farm Supply v. Ford New Holland, Inc.*, 898 F. Supp. 1198 (W.D. Ky. 1995) (alleged promise merely induced plaintiff to perform duties under existing dealership contract); *FGB Realty Advisors v. Seven Winds Realty*, No. CV 94 0066260, 1995 Conn. Super LEXIS 3582 (Conn. Super. Ct. Dec. 22, 1995) (no actual reliance shown by making a payment that was already due); *Prentice v. UDC Advisory Servs.*, 648 N.E.2d 146 (Ill. App. Ct. 1995) (promissory estoppel is barred if the alleged detrimental reliance is the performance of duties under a written contract, but may be pled in the alternative until defendant admits the contract).
- (8) *The alleged reliance constituted performance of a pre-existing duty under a statute or regulation*: *In re 375 Park Ave. Assocs.*, 182 B.R. 690 (Bankr. S.D.N.Y. 1995) (charitable organization could not show reliance by doing what it was legally required to do at time of promise).
- (9) *The reliance did not cause any financial loss to plaintiff*: *Sterling Interiors Group v. Haworth, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,557 (S.D.N.Y. July 29, 1996) (plaintiff profited from its reliance); *Mass Cash Register, Inc. v. Comtrex Sys. Corp.*, 901 F. Supp. 404 (D. Mass. 1995); *Grayboyes v. General Am. Life Ins. Co.*, No. 92-2515, 1995 U.S. Dist. LEXIS 4233 (E.D. Pa. Mar. 31, 1995); *Piantes v. Pepperidge Farm, Inc.*, 875 F. Supp. 929 (D. Mass. 1995) (no loss shown except the profits plaintiff would have made if promisor performed); *Seta v. Reading Rock, Inc.*, 654 N.E.2d 1061 (Ohio Ct. App. 1995) (stopping illegal drug use in reliance on employer's promise is not detrimental reliance). *But cf. Strata Prod. Co. v. Mercury Exploration Co.*, 916 P.2d 822, 829-30 (N.M. 1996) (promisee demonstrated necessary reliance in its drilling of a wildcat well that turned out to be productive; promisee relied by taking the risk that it would be dry).
- (10) *Although plaintiff relied and the reliance led to loss, the loss was suffered by another party*: *Fields v. General Motors Corp.*, 932 F. Supp. 212 (N.D. Ill.

and Matheson's contention that actual reliance need not be proved so long as the promise is made seriously in furtherance of a commercial activity or Yorio and Thel's contention that actual reliance is unnecessary if the promise is one that is likely to induce reliance.¹²⁹ Every single opinion that mentioned the matter instead affirmed the Restatement requirement that the plaintiff actually rely, some of them adding that the reliance must be "substantial" as in the first Restatement version.¹³⁰ Considered as a group, these holdings lay to rest Farber and Matheson's assessment that actual reliance is no longer an element of a claim of promissory estoppel. This conclusion accords with other recent empirical studies of promissory estoppel in appellate decisions.¹³¹

In making *their* case that actual reliance has never been necessary to a promissory estoppel claim, Yorio and Thel focused on rare cases involving charitable gifts, promises in consideration of marriage, and

1996) (shareholders' reliance on promise of Cadillac distributorship induced their corporation to resign its franchise; shareholders had no Section 90 claim).

- (11) *The alleged reliance was caused by some other factor*: *Mecier v. Branon*, 930 F. Supp. 165, 170 (D. Vt. 1996) (plaintiff's alleged reliance (not returning to work sooner) was caused by his failure to obtain a doctor's approval, not defendant's promise that his job was secure); *Shumate v. Dugan*, 934 S.W.2d 589 (Mo. Ct. App. 1996) (defendant's alleged reliance in failing to probate will was the result of legal ignorance rather than reliance on a promise of land); *see also* *Neely v. American Family Mut. Ins. Co.*, 930 F. Supp. 360, 375 (N.D. Iowa 1996) (promisee gave promisor no reason to believe that he was relying on the alleged promise in deciding to purchase the insurance).

A small minority of opinions in the survey held to the literal reading of Section 90 in requiring only that the promise induce some "action or forbearance" by the promisee. *E.g.*, *Jackson Nat'l Life Ins. Co. v. Gofen & Glossberg, Inc.*, 882 F. Supp. 713 (N.D. Ill. 1995) (sufficient reliance is shown if the promise induces some action that would not have otherwise occurred, here the forbearance to seek other sources of promised services). Other decisions seem not to have emphasized the detrimental nature of the reliance. *E.g.*, *Cornelio v. New Hampshire Ins. Co.*, No. CV-92-510820, 1995 Conn. Super. LEXIS 950 (Conn. Super. Ct. Apr. 3, 1995) (plaintiff relied on promise to pay insurance claim by not taking action against others to seize control of insurance proceeds paid to them); *Rooney v. Paul D. Osborne Desk Co.*, 645 N.E.2d 50 (Mass. App. Ct. 1995) (reliance on promise of benefits when plaintiff went from being commission salesman to corporate officer was rendition of future services).

129. No case in the Westlaw or LEXIS databases has ever cited Farber and Matheson or Yorio and Thel for either of these ideas.

130. *E.g.*, *Baer v. First Options of Chicago*, No. 90 C 7207, 1995 U.S. Dist. LEXIS 512 (N.D. Ill. Jan. 18, 1995) (Illinois law).

131. *E.g.*, *Pham, Waning*, *supra* note 2, at 1287 ("Contrary to the claims of promise-focused theorists, the survey of state court cases since 1981 indicates that detrimental reliance remains crucial to a promissory estoppel claim.") (footnote omitted).

insurance promises,¹³² ignoring the role that actual reliance played in the far more numerous promissory estoppel cases involving employment, franchise termination, lender-liability, and failed business negotiations.¹³³ The authors dismissed the judicial unanimity in requiring reliance as merely a make-weight argument,¹³⁴ used to bolster decisions that are actually premised on the lack of a firm promissory commitment.¹³⁵

The cases in the sample fail to support this contention. It is true that in many cases, opinions affirming the necessity for reliance element also involved some other missing element.¹³⁶ The most common defect was

132. Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 152-54, 156. This focus resulted from the authors' decision to concentrate their analysis on the cases cited by the Restatement and similar authorities rather than on a sample of contemporary decisions. The paucity of such cases in the reported decisions had already been noted by Stanley Henderson as well-established in 1969. *See supra* note 103.

133. For example, roughly half the promissory estoppel cases in 1995-1996 involved employment-related claims.

134. Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 159 (characterizing judicial references to actual reliance as either gilding the lily or as being inaccurate); *see also* Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 904 (stating that courts are "constrained to speak the language of reliance" and "most cases denying recovery, purportedly for lack of reasonable reliance, can be readily explained on other grounds."). Such statements should always excite skepticism. While it is conceivable that courts are being systematically dishonest about the true grounds of their rulings, it is highly unlikely that they are systematically following some deep principle of which they are unaware. *Cf.* Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 922-23, 926-27 (1986) (expressing skepticism about a claim that people, including judges, act rationally without awareness). "It is unfortunately very difficult to discuss the possible reasons for rules of law without unwittingly conveying the impression that these 'reasons' are the things which control the daily operations of the judicial process." Fuller & Perdue, *The Reliance Interest*, *supra* note 23, at 57.

135. Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 158-59. Yorio and Thel, concede, however, that actual reliance serves as an additional reason for enforcement under a promissory theory as evidencing the foreseeability of reliance as well as evidencing the fact that the promise was made. *Id.* at 159.

136. A number of cases cited the absence of actual, detrimental reliance along with other defects in the plaintiff's claims. *See* Vana v. Mallinckrodt Med., Inc., No. 94-3424, 1995 U.S. App. LEXIS 35488 (6th Cir. Nov. 8, 1995); Stewart v. Whitmire Distrib. Corp., No. 94-1096, 1995 U.S. App. LEXIS 9544 (10th Cir. Apr. 26, 1995) (affirming summary judgment for defendant because plaintiff's evidence established neither reliance nor foreseeability); Rollins v. Midland Steel Prods. Co., No. 94-3138, 1995 U.S. App. LEXIS 9764 (6th Cir. Apr. 26, 1995) (affirming summary judgment for defendant because of lack of clear promise, reasonable reliance, or evidence of actual reliance); Williams v. Pacific Maritime Ass'n, No. 93-56287, 1995 U.S. App. LEXIS 5188 (9th Cir. Mar. 15, 1995) (notice of dispute makes reliance unreasonable); Keenan v. Allan, 889 F. Supp. 1320 (E.D. Wash. 1995) (no actual reliance or mutual assent); Piantes v. Pepperidge Farm, Inc., 875 F. Supp. 929 (D. Mass. 1995) (defendant gave opinion, not promise, and plaintiff's reliance was profitable, not detrimental); Lark v. Post

the absence of a clear and distinct promise, which is consistent with Yorio and Thel's promise theory.¹³⁷

Many of the 1995-96 cases, however, denied promissory estoppel claims on the *sole* ground that plaintiff had not demonstrated actual, detrimental reliance.¹³⁸ The absence of actual reliance was decidedly

Newsweek Stations Conn., No. CV94 070 53 26, 1995 Conn. Super. LEXIS 2332 (Conn. Super. Ct. Aug. 9, 1995) (striking promissory estoppel claim because of existence of written contract); *In re Plaza v. Estate of Wisser*, 626 N.Y.S.2d 446 (N.Y. App. Div. 1995) (no clear and distinct promise to support plaintiff and no reliance shown); *Winter v. County Club*, No. 17024, 1995 Ohio App. LEXIS 4157 (Ohio Ct. App. Sept. 20, 1995) (affirming summary judgment for defendant, plaintiff presented no evidence of actual reliance, such as lost opportunities); *Enlow v. Empire-Detroit Steel Div., Cyclops Corp.*, No. 94-CA-80, 1995 Ohio App. LEXIS 3628 (Ohio Ct. App. Aug. 1, 1995) (no clear promise and no showing of actual reliance where employee looked for other jobs after the "promise" of permanent employment was made); *Corradi v. Soclof*, No. 67586, 1995 Ohio App. LEXIS 2162 (Ohio Ct. App. May 25, 1995) (affirming summary judgment for employer in wrongful termination suit, in part because plaintiff did not demonstrate any reliance on the alleged promise of permanent employment); *Henning v. Marriott Hotel & Resorts*, No. 14926, 1995 Ohio App. LEXIS 2119 (Ohio Ct. App. May 24, 1995) (no clear promise and no actual reliance by turning down other job offers); *Paolucci v. Robinson Mem'l Hosp.*, No. 94-P-0022, 1995 Ohio App. LEXIS 886 (Ohio Ct. App. Mar. 10, 1995) (promise disclaimed in employee handbook and no reliance where employment preceded making of promise); *Seta v. Reading Rock, Inc.*, 654 N.E.2d 1061 (Ohio Ct. App. 1995) (no promise not to terminate proved, and no detrimental reliance in having stopped illegal drug use in reliance on discipline procedures); *Ross v. Times Mirror, Inc.*, 665 A.2d 580 (Vt. 1995) (handbook disclaimer of liability and no showing of an oral promise or detrimental reliance).

137. It is not surprising to see the elements of specificity and reliance failing in the same case. An equivocal promise is less likely to induce actual reliance.

138. Plaintiff's failure to establish actual detrimental reliance on the promise was the only stated reason for denying promissory estoppel in numerous cases. See *Thanksgiving Tower Partners v. Anros Thanksgiving Partners*, 64 F.3d 227 (5th Cir. 1995) (plaintiff's alleged reliance was the performance of a pre-existing contractual obligation); *Boone v. Federal Express Corp.*, 59 F.3d 84 (8th Cir. 1995) (no evidence of actual reliance on employer's oral promise of employment); *Variety Children's Hosp. v. Century Med. Health Plan*, 57 F.3d 1040 (11th Cir. 1995) (plaintiff's alleged reliance in providing health care occurred after defendant withdrew its promise to pay for care); *FDIC v. Patel*, 46 F.3d 482 (5th Cir. 1995) (plaintiff did not rely on promise of financing where it was already legally obligated to repay loan and was unable to repay regardless of defendant's promise); *Baker v. Pease Co.*, No. 89-3985, 1995 U.S. App. LEXIS 550 (6th Cir. Jan. 9, 1995) (plaintiff proved no action or forbearance in reliance on promise of permanent employment; continuing to work was not detrimental reliance); *Diehl v. Twin Disc, Inc.*, No. 94 C 50031, 1996 U.S. Dist. LEXIS 4117 (N.D. Ill. Apr. 2, 1996) (employer's alleged promise was made in an exit interview after plaintiffs had already decided to retire); *Mass Cash Register, Inc. v. Comtrex Sys. Corp.*, 901 F. Supp. 404 (D. Mass. 1995) (promise of confidentiality proved but no showing of detrimental reliance in lost profits because they depended on promisor's involvement); *Tractor & Farm Supply, Inc. v. Ford New Holland, Inc.*, 898 F. Supp. 1198 (W.D. Ky. 1995) (alleged reliance was the performance of a contractual duty); *Kietlinski v. General Elec. Co.*, 886

determinative, not merely make-weight, in these cases. The need to prove actual detrimental reliance was also emphasized in the relative few Section 90 decisions in plaintiffs' favor.¹³⁹

F. Supp. 994 (N.D.N.Y. 1995) (no proof that plaintiff class members relied on defendant's statements); *Lerner v. General Elec. Co.*, No. 93-5787, 1995 U.S. Dist. LEXIS 14374 (E.D. Pa. Sept. 28, 1995) (reliance was not demonstrated by employee's failure to look for work elsewhere); *Sadowski v. Technical Career Insts.*, No. 93 Civ. 455 (PKL), 1995 U.S. Dist. LEXIS 13262 (S.D.N.Y. July 25, 1995) (dismissing claim where actual reliance not pleaded); *Grayboyes v. General Am. Life Ins. Co.*, No. 92-2515, 1995 U.S. Dist. LEXIS 4233 (E.D. Pa. Mar. 31, 1995) (purchasing home was not actual reliance on insurer's promise to pay); *Miyano Mach. USA v. Dusan Zonar, L&D Mach.*, No. 92 C 2385, 1995 U.S. Dist. LEXIS 890 (N.D. Ill. Jan. 25, 1995) (no reliance if plaintiff maker of promissory note had no alternative to making payment); *FGB Realty Advisors v. Seven Winds Realty*, No. CV 94 0066260, 1995 Conn. Super. 3582 (Conn. Super. Ct. Dec. 22, 1995) (plaintiff did not change position on alleged promise by making a payment that was already due); *Struck v. Hackett*, 668 A.2d 411 (Me. 1995) (plaintiff had changed position before alleged promise was made); *Shumate v. Dugan*, 934 S.W.2d 589 (Mo. Ct. App. 1996) (refusing to enforce oral promise to convey land because claimants could not show that their claimed reliance in not probating a will was caused by the promise); *Doe v. Adkins*, 674 N.E.2d 731 (Ohio Ct. App. 1996) (no reliance shown on promise of medical treatment); *Paulson v. Vanlandingham*, No. CA95-07-045, 1996 Ohio App. LEXIS 426 (Ohio Ct. App. Feb. 12, 1996) (no proof of any reliance on promise to repair easement); *Martin v. Huntington Nat'l Bank*, No. L-95-077, 1995 Ohio App. LEXIS 5051 (Ohio Ct. App. Nov. 17, 1995) (because plaintiff was being relocated anyway, her acceptance of employment was not detrimental reliance on defendant's promise); *Bobek v. Notre Dame College*, No. 68586, 1995 Ohio App. LEXIS 3758 (Ohio Ct. App. Aug. 31, 1995) (affirming dismissal of employee's claim for breach of oral promise not to terminate because no evidence of detrimental reliance was presented); *Properties Dev. v. Sto-Kent Lanes, Inc.*, No. 17059, 1995 Ohio App. LEXIS 2169 (Ohio Ct. App. May 24, 1995) (promisor revoked oral promise to contribute to cost of constructing road before plaintiff relied); *Gilbert v. Alcan Aluminum Corp.*, No. 67544, 1995 Ohio App. LEXIS 1417 (Ohio Ct. App. Apr. 6, 1995) (no showing of injury resulting from reliance on defendant's promise to give plaintiff a good recommendation at the time he was fired); *W&K Assocs., Ltd. v. Mesa Operating Ltd. Partnership*, No. 07-96-0007-CV, 1996 Tex. App. LEXIS 4871 (Tex. Ct. App. Nov. 4, 1996); *Stangel v. Ramohalli*, No. 05-95-00801-CV, 1996 Tex. App. LEXIS 3076 (Tex. Ct. App. July 16, 1996); *cf. Resource Tech. Corp. v. Fisher Scientific Co.*, 924 P.2d 972, 977 (Wyo. 1996) (even assuming that evidence of promise was not barred by the parol evidence rule, plaintiffs could not recover under promissory estoppel because the alleged reliance did not result in proven financial loss).

139. In some of these cases, the plaintiff obtained judgment. See *Architectural Metal Sys. v. Consolidated Sys.*, 58 F.3d 1227 (7th Cir. 1995) (general contractor relied on subcontractor's bid by using it in entering prime contract); *Percy J. Matherne Contractor v. Grinnell Fire Protection Sys. Co.*, 915 F. Supp. 818 (M.D. La. 1995) (same, granting summary judgment for plaintiff); *Rooney v. Paul D. Osborne Desk Co.*, 645 N.E.2d 50 (Mass. App. Ct. 1995) (affirming jury verdict for plaintiff, reliance on employer's promise of stock option was the rendering of future services).

In other cases, the defendant's motion for dismissal or summary judgment was denied, or its grant was reversed. See *In re 375 Park Ave. Assocs.*, 182 B.R. 690

2. NORMATIVE CRITIQUE OF PROMISE THEORY

Farber and Matheson endorsed the trends they thought they had discovered on economic policy grounds. They advanced the thesis that legal enforcement of all promises that are made in the course of commercial activity would foster a general attitude of trust and confidence in commercial promisors.¹⁴⁰ The authors characterized this trust as a "public good," whose preservation under Section 90 is in the long-term interest of all commercial promisors.¹⁴¹ They contended that enforcement of all commercial, non-bargain promises will encourage promisees to rely and will facilitate economic exchange, as does enforcement of commercial, bargain promises.¹⁴² In line with these arguments, the authors proffered a proposed Restatement provision that would replace both Section 71 (the consideration doctrine) and Section 90. Under their recommendation, "[a] promise is enforceable when made in furtherance of an economic activity."¹⁴³

It is ironic that the authors seem not to have appreciated the point made in the quotation from economist Arthur Okun that introduced their article and from which they took its title, *The Invisible Handshake*.¹⁴⁴

(Bankr. S.D.N.Y. 1995) (denying defendant's motion for summary judgment, noting that charitable association could have relied on pledge by using it as collateral for a loan); *Schleicher v. Alliance Corp.* Resources, Nos. 95APE03-311 to -312, 1995 Ohio App. LEXIS 5405, at *15 n.3 (Ohio Ct. App. Dec. 7, 1995) (reversing dismissal of plaintiff's claim, court implies that proof of actual reliance requires that plaintiff show that he had alternatives to alleged acts of reliance); *Stahl v. Brush-Wellman, Inc.*, No. OT-95-01, 1995 Ohio App. LEXIS 4538 (Ohio Ct. App. Oct. 13, 1995) (reversing summary judgment for defendant, court notes that plaintiff must prove actual reliance on employer's promise of non-retaliation); *Vershoor v. Mountain West Farm Bureau Mut. Ins. Co.*, 907 P.2d 1293 (Wyo. 1995) (reversing summary judgment for defendant, plaintiff must prove detriment suffered by reliance on insurer's oral promise of insurance coverage).

140. Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 925-29.

141. *Id.* at 928.

142. *Id.* at 929 ("[T]he role of reliance in establishing liability and determining damages in individual cases is on the decline—but reliance, in the form of trust, is on the rise as the policy behind legal rules of promissory obligation.").

143. *Id.* at 930. The authors impose three additional qualifications: the promise must be "credible"; it must be made by one with authority to bind the promisor; and the promisor must anticipate benefit from the economic activity. *Id.* at 930-34.

144. The complete quotation was as follows:

Employers do, in fact, rely heavily on the "invisible handshake" as a substitute for the invisible hand that cannot operate effectively in the career labor market. While nonunion firms do make commitments that are morally, and even legally, binding for a year ahead on wage rates (and, for some salaried employees, on total earnings), they generally opt for implicit rather than explicit contracts beyond that period. Apparently employers believe they can influence the long-term expectations of workers favorably with nonbinding

Okun expressed surprise that, in order to induce employee loyalty, most nonunion employers apparently prefer to make *nonbinding* commitments rather than binding contracts.¹⁴⁵ The employer's handshake is legally "invisible," i.e., unenforceable. This observation should have led Farber and Matheson to question their proposed rule that all such promises should be made legally enforceable. The employers whom Okun describes would already be making enforceable promises if they thought the advantages of enforceability outweighed its costs.¹⁴⁶

Okun's observation also suggests that most employers would contract out of a rule making their assurances *prima facie* enforceable.¹⁴⁷ And, to the extent that one may infer anything about actual commercial practice from appellate reports,¹⁴⁸ that is what the sampled cases in fact demonstrated. The implication of Okun's observation about employer behavior is that the best default rule to save these transaction costs is non-liability.¹⁴⁹

statements that preserve much of their own flexibility.

ARTHUR OKUN, *PRICES AND QUANTITIES: A MACROECONOMIC ANALYSIS* 89 (1981), *quoted in* Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 903.

145. *Id.*

146. For a similar argument, see *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 448 (7th Cir. 1987) (Posner, J., dissenting) (arguing that the fact that companies may face market constraints against exploitation of employees does not imply that they also assume contractual duties) (citing Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963) (business people often fail to assume contractual duties)).

147. *Cf.* Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 935-36 (noting that promisors could avoid liability under their proposed rule by disclaiming an intention to be legally bound). The authors seem vulnerable to a criticism they later leveled at an argument made by Duncan Kennedy: "As to efficiency, Professor Kennedy generally overlooks one of the basic lessons of economics: firms are not passive in the face of legal rules." *Id.* at 944.

148. It is highly unlikely that the events described in appellate case reports are a representative sample of all commercial practices, so one should be reluctant to draw any conclusions about actual practice from such a source. One cannot even conclude that appellate case reports accurately reflect the nature of commercial disputes or of the majority of litigated cases. MACAULAY ET AL., *LAW IN ACTION*, *supra* note 100, at 261-62. One can, however, cautiously conclude that it is not uncommon for commercial promisors to couch their statements in disclaimers if only because of the relative frequency of such cases in the appellate reports.

149. This is not to suggest that the current rule is in practice more efficient than the proposed rule at the transaction stage. The case law demonstrates that many commercial promisors already incur the costs of disclaiming liability under the current rule. The choice of a different default rule, however, might significantly affect the judicial enforcement costs, for example, with respect to the burden of proof or the availability of summary judgment. Many disclaimer cases were disposed of at summary judgment.

Farber and Matheson might respond that, even if it is not the rule that most commercial promisors would choose, a presumption of enforceability is an efficient default rule because it is an "information-forcing" default rule of the sort that was later identified by Ian Ayres and Robert Gertner.¹⁵⁰ Ayres and Gertner analyzed the foreseeability rule in the law of contract damages as being efficient not because it is the rule that most parties would choose—it isn't¹⁵¹—but because by penalizing the promisee who fails to disclose to the promisor the consequential damage that breach would cause, the rule forces the promisee to disclose information that will permit the promisor to make efficient decisions about whether to enter the contract and how much to expend in performing it.¹⁵² Anticipating Ayres and Gertner's analysis, Farber and Matheson claimed that their default rule would force employers and other commercial promisors to disclose their intention *not* to be legally bound: "[W]here potential promisors are less than confident of their future conduct, the proposed rule fosters better information transmission by encouraging them to reveal their uncertainties. This information will help to insure [sic] that promisors will be trusted only insofar as they are worthy of trust."¹⁵³

But this argument confuses a promisor's willingness to be legally bound with his willingness to perform a serious promise.¹⁵⁴ As shown above in Part II.A, the two are both conceptually and practically distinct. A commercial promisor's decision to opt for enforceability depends on his estimate of the relative costs and benefits of enforceability, not simply on the seriousness of the promise or the commitment to perform. He may make an unenforceable promise with a firm intention to perform. A

150. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*] ("penalty default[]" rules intentionally contradict what the parties would have agreed to in order to induce parties to make efficient disclosures of information); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992). But parties engaged in strategic bargaining may have incentives to withhold information that the default rule mandates be disclosed. Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990).

151. See Ayres & Gertner, *Filling Gaps*, *supra* note 150, at 93-95.

152. See *id.* at 97-100.

153. Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 936; cf. Goetz & Scott, *Enforcing Promises*, *supra* note 16, at 1279-80 (explaining that a rule enforcing all non-reciprocal promises will minimize risk by providing better information to the promisee about the quality of the promise, but may lead to promisees over-relying).

154. See *supra* Part II.A. Yorio and Thel make the same mistake of confusing a promisor's commitment to perform a serious promise with his willingness to be legally bound to answer in damages if he fails.

promisee may be more reasonable in relying on an unenforceable promise made by a person with a good reputation than upon an enforceable promise made by a less trustworthy promisor.¹⁵⁵

The information-forcing argument is premised on inconsistent assumptions about the promisee's legal awareness. Farber and Matheson assume that employees will be aware of their proposed default rule—that an employer's promise is *prima facie* enforceable—because it is only this assumption that leads to the transaction cost-reducing benefits of trust and reliance.¹⁵⁶ If, however, the promisee is assumed to be aware of the default rule, then the promisor's intention and level of commitment will be apparent to the promisee regardless of the default rule chosen. The analogy to information-forcing rules is inapt. Unlike the disclosure of individualized information about potential consequential losses that would result upon breach, the disclosure of the legal effect of the promise will not add to the promisee's knowledge anything that could not be deduced from knowledge of the default rule itself.

More important, even if the disclosure of enforceability added to the promisee's information, a default rule mandating disclosure of *unenforceability* is likely to be inefficient because it conflicts with the promisor's natural incentives. Farber and Matheson's rule would require the employer in most cases to disclose unfavorable information—unenforceability—perhaps with an explanation of the degree of commitment short of legal enforceability the employer intends to undertake. The employer would have an incentive to obscure or gloss over the disclosure.¹⁵⁷ The opposite default rule would give the rare employer who wished to make a legally binding, non-bargain promise the incentive to disclose favorable information. As seen above, the whole point of making an enforceable promise is that the promisee realize and value its enforceability. On the assumption that employees have some background understanding of the enforceability of a promise, and that the default rule chosen will define that understanding, then there is no reason to believe that Farber and Matheson's rule is more efficient than its opposite.

155. The Restatement recognizes the value that a promisee might put on an unenforceable promise. SECOND RESTATEMENT, *supra* note 1, § 78 cmt. a.

156. Farber and Matheson's reference to "trust" is problematic. See Farber & Matheson, *Invisible Handshake*, *supra* note 11, at 929. It seems odd to say that making an employer's promise legally enforceable fosters trust in the employer. Rather, one relies on enforceability precisely because one does not trust the promisor.

157. A similar problem in criminal procedure involves the Miranda warning. Because a suspect's silence does not serve the interests of police officers, they are likely to undermine the message they must convey about the constitutional right to remain silent.

B. Consent Theories

Closely related to promise theorists are consent theorists, of whom Randy Barnett is undoubtedly the foremost proponent.¹⁵⁸ Barnett views the creation of an enforceable contract obligation as equivalent to the transfer of a property entitlement (to performance) from the promisor to the promisee.¹⁵⁹ From the natural law axiom that the transferor's consent is essential to a transfer of property,¹⁶⁰ Barnett derives the principle that all contract obligation, whether bargain contract or Section 90, properly derives solely from the promisor's manifestation of consent to incur legal liability.¹⁶¹ The consent theory thus rejects both the consideration doctrine and the protection of reliance as either necessary or sufficient justifications for promissory enforcement. Although he rejects promise theory, Barnett echoes Fried in arguing that a promisor is not bound because of the promisee's reliance; rather, reliance is justified because the promisor manifested consent to be legally bound.¹⁶²

158. Barnett, *A Consent Theory*, *supra* note 27. Another is Mary Becker, *see* Becker, *Promissory Estoppel Damages*, *supra* note 11, at 131. Elements of consent theory can be found in the work of the law and economics school insofar as they affirm the value to the promisor of being able to make a binding, non-bargain promise. *See* Posner, *Gratuitous Promises*, *supra* note 12; *see also* Goetz & Scott, *Enforcing Promises*, *supra* note 16. Professor Kostritsky might classify herself as a consent theorist, given her "assent-based" theory of Section 90 liability, but she seems to focus more on exchange elements in the creation of liability than solely on the promisor's expression of consent. *See* Kostritsky, *A New Theory*, *supra* note 11.

Barnett contrasts consent and promise theories in Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992). He argues that because they do not require intention to be legally bound, promise theories have difficulty stating which promises ought to be enforceable. *Id.*

159. Barnett, *A Consent Theory*, *supra* note 27, at 291-95.

160. *Id.* at 296-300. The validity of this axiom will not be addressed here. *But see* Fuller & Perdue, *The Reliance Interest*, *supra* note 23, at 59-60 (suggesting that to consider a promise of future goods a property interest in a credit economy is to beg the question).

161. Barnett, *A Consent Theory*, *supra* note 27, at 300-09; Barnett, *Death of Reliance*, *supra* note 11, at 534-36. Barnett's approach resembles that of continental civil law legal systems, in which the basis of contractual liability is manifestation of consent to be legally bound. *See* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 134 (rev. ed. 1954) [hereinafter POUND, PHILOSOPHY OF LAW] ("Modern continental law, apart from certain requirements of proof . . . asks only, Did [sic] the promisor intend to create a binding duty?"); Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959).

162. *See* Barnett, *Death of Reliance*, *supra* note 11, at 522. Much like Fried, *see* FRIED, CONTRACT AS PROMISE, *supra* note 44, Barnett and Becker conclude that many putative promissory estoppel cases, including *Hoffman*, are actually cases of misrepresentation, and suggest development of a tort of negligent misrepresentation to

As can be seen, the promisor-choice version of contract presented above in Part II is a version of the consent theory of contract, albeit based on different justifications.¹⁶³ Barnett's application of his consent theory to promissory estoppel claims, however, yields results quite different from those described in Part II because of his principles of contract interpretation. Barnett subscribes to an objective theory of contract interpretation under which one may conclusively infer "consent to be legally bound" from behavior that does not expressly state consent.¹⁶⁴ Barnett thus distinguishes "assent" to be bound, a subjective state of mind, from "consent" to be bound, a speech act manifesting the assent.¹⁶⁵ Legal liability turns on the latter, even when actual assent is absent. This differentiates consent theory from a "will" theory of contract.¹⁶⁶ Moreover, the speech act of consent can be implied as well as express, so that no expression of an intention to be bound is required.¹⁶⁷ Thus, Barnett views bargain promises as manifesting the requisite consent to be bound regardless of the promisor's actual, unexpressed understanding of the consideration doctrine.¹⁶⁸ Similarly, he contends that a Section 90 promisor can manifest consent to be bound

handle such cases. Barnett & Becker, *Beyond Reliance*, *supra* note 11. Several cases in the 1995-1996 survey appear to be decided on misrepresentation or equitable estoppel grounds rather than under the doctrine of promissory estoppel. See, e.g., *Hurwitz v. Bocian*, 670 N.E.2d 408 (Mass. App. Ct. 1996) (holding that defendant's oral agreement to give plaintiff equal partnership in business was a promise made without intention to perform, a misrepresentation that overcomes statute of frauds for contracts for the sale of securities, U.C.C. § 8-319).

163. The idealized theory of Part II justifies enforcement on the basis of a view about the utility and purpose of contract law as a resource for market traders rather than on the basis of natural law. In my view, Barnett's property analogy is unnecessary and inadequate to justify enforcement of contract promises. Property rights can be altered without the holder's consent, for example, by legislation. Barnett does affirm the value of a consent theory under principles of utility, however. I am in complete agreement with Barnett's view that enforceability should depend on the promisor's consent to enforcement, though not with his contentions about what should count as consent.

164. Barnett, *A Consent Theory*, *supra* note 27, at 304-09.

165. *Id.* at 297-98, 303, 305.

166. *Id.* at 300-01, 303.

167. *Id.* at 312.

168. *Id.* at 306-07, 313-14. Jean Braucher argues that Barnett's objective definition of "consent" is highly problematic for the rest of his theory. Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 703-06 (1990). She points out that social and interpretive norms give rise to regulatory rules of contract construction and enforcement and it is only within such rules that "consent" is "found." *Id.* Yet, consent so broadly defined could be extended to all forms of civil obligation, including those arising from the rules of negligence. *Id.* Braucher's critique robs the consent theory of its normative claim that contract liability is grounded in exercises of personal autonomy.

without referring explicitly to enforceability, as for example by "standing silently by" as the promisee relies on the promise.¹⁶⁹ But reliance is not necessary in cases in which the promisor "apparently intended to be legally bound by the promise."¹⁷⁰ Such an intention can be manifested by making a promise in a bargain exchange that involves a formal bar to enforcement, such as the statute of frauds;¹⁷¹ making a promise in an implicit bargain exchange for the promisee's reliance;¹⁷² making firm offers or bids;¹⁷³ and making promises in conjunction with already enforceable bargain promises, such as contract modifications.¹⁷⁴ Thus, whereas the promisor-choice theory of contract obligation would require the promisor to state explicitly his intention to be legally bound, Barnett's consent theory requires no such signal.

1. DESCRIPTIVE CRITIQUE OF CONSENT THEORY

Barnett cautioned that his theory may not accurately describe judicial beliefs about Section 90.¹⁷⁵ Nevertheless, the 1995-96 case sample contains several decisions suggesting that a manifestation of consent to be legally bound may be becoming essential to liability under Section 90. For example, in *Orback v. Hewlett-Packard Co.*,¹⁷⁶ the court granted summary judgment against the plaintiffs in a wrongful termination suit on the grounds that the employer had failed to manifest a willingness to be legally bound to the disciplinary policies in question.¹⁷⁷ The court reasoned that, under Colorado law, the manifested intent required under Section 90 was the same as that required to create a contract implied in fact.¹⁷⁸ In *Omega Engineering v. Eastman Kodak Co.*,¹⁷⁹ the court found that the seller's statements to the buyer could be interpreted to

169. Barnett, *A Consent Theory*, *supra* note 27, at 314-15.

170. Barnett & Becker, *Beyond Reliance*, *supra* note 11, at 449.

171. *Id.* at 470-85 (formal bars include the statute of frauds, parol evidence rule, and illusory promises).

172. *Id.* at 455-57.

173. *Id.* at 457-60.

174. *Id.* at 460-69 (contract modifications, assurances incident to a bargain, and pension promises).

175. *E.g.*, Barnett, *Death of Reliance*, *supra* note 11, at 527 ("[W]hat students may know and law professors probably should know about the death of reliance is probably unknown to judges. Judges may do in practice what these scholars describe them as doing, but they are not aware of it.").

176. 909 F. Supp. 804 (D. Colo. 1995), *aff'd*, 97 F.3d 429 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997).

177. *Id.* at 810.

178. *Id.* at 808-09.

179. 908 F. Supp. 1084 (D. Conn. 1995); *see* discussion *infra* Part IV.D.

constitute a “present intention . . . to undertake immediate contractual obligations”¹⁸⁰ as required under Connecticut’s law of promissory estoppel.¹⁸¹ The language of these decisions requires the promisor to engage in a form of intentional contract-creation which amounts to manifestation of consent to enter a contract.

Barnett’s consent theory also accounts for the courts’ general acceptance of the rule that a commercial promisor’s clear expression of a refusal to be legally bound immunizes him from Section 90 liability. Many courts have extended this rule to deny recovery to sophisticated promisees who should have known that if the promisor intended to be legally bound, he would have proceeded in a more formal manner.¹⁸² Such decisions support what might be called the negative half of the consent theory of Section 90, which is both traditional and largely non-controversial: one who expresses an intention not to be legally bound usually will not be.¹⁸³

The first descriptive problem with Barnett’s theory is its standard for determining what counts as manifestation of consent to be legally bound. Contrary to Barnett’s view that deliberately inducing reliance on a promise counts as manifestation, the cases discussed below in Parts III.B and III.C demonstrate that even where reliance is explicitly requested by the promisor, the court may find that the parties were aware that the promisor did not intend to be legally bound.¹⁸⁴

Barnett’s theory suffers from a second, more serious, descriptive problem because it rejects actual reliance as essential to liability under Section 90. For Barnett, as for the promise theorists, the Section 90 promise becomes binding when it is made, regardless of the presence or absence of subsequent reliance by the promisee.¹⁸⁵ Because he contends that actual reliance should be unnecessary to enforceability under Section 90, Barnett’s consent theory cannot account for the courts’ continuing insistence on actual reliance and their refusal to enforce non-bargain promises in its absence.

180. *Id.* at 1092 (quoting *D’Ulisse-Cupo v. Board of Directors of Notre Dame High Sch.*, 520 A.2d 217, 221-22 (Conn. 1987)). Apparently, such manifested intention is an element of promissory estoppel in this jurisdiction.

181. Neither *Orback* nor *Omega* involved a promise accompanied by a statement of enforceability, however, so each would fall short of the standard I proposed in Part II.

182. See discussion *infra* Part IV.

183. SECOND RESTATEMENT, *supra* note 1, § 21 & cmt. b.

184. *E.g.*, *Puri v. Blockbuster Music Retail*, No. 95-C-50018, 1995 U.S. Dist. LEXIS 18819 (N.D. Ill. Dec. 20, 1995); see discussion *infra* part IV.B.

185. Barnett, *Death of Reliance*, *supra* note 11, at 523-25, 533-34.

2. NORMATIVE CRITIQUE OF CONSENT THEORY

Barnett proposes that all commercial promises be presumed to have been made with the intention that they be legally binding.¹⁸⁶ This latter presumption conflicts with the most probable account of commercial promising, however, as shown above.¹⁸⁷ Most commercial promisors do not want their non-bargain promises to be legally binding and will contract around a rule that makes them *prima facie* binding. Thus, one cannot presume that a commercial promise manifests consent to be legally bound without doing violence either to the probable intention of the promisor or to the notion of consent itself. If consent is not manifested, then a promisee's expectation that the promise is enforceable becomes unreasonable. Indeed, the more legally sophisticated the parties are, the less reason a promisee has to infer consent from a non-bargain, informal commercial promise.

Barnett might respond that Section 90 itself makes the promisor's reliance-inducing behavior interpretable as a manifestation of consent. Thus, if Corbin promises Williston that he will grant him a gratuitous easement for business purposes, both parties would be aware that Section 90 would enforce the promise upon Williston's reliance, and both therefore would understand Corbin to be manifesting consent at the time he made the promise if he later stood silently by as Williston proceeded to act in reliance. But courts do not interpret Section 90 this broadly, so the interpretive inference would not be warranted. No court that I have found within the sample or anywhere else has held or implied that a promisor manifested assent to be bound, or that a promisee's reliance was foreseeable, on the grounds that both parties should have known that courts enforce reliance-inducing promises under Section 90. The interpretation of the promisor's behavior as consent to be bound depends on the default rule that is in effect at the time of the promise.¹⁸⁸ In choosing to enforce reliance-inducing promises, courts establish grounds for future, legally sophisticated promisees to manifest consent to be legally bound. It begs the question to argue that it is a manifestation of consent to stand silently by as a promisee relies.

186. *Id.* at 528. He argues for a contrary presumption for non-commercial promises. *Id.*

187. *See supra* Part II. A possible exception to this generalization is the understanding of subcontractors and contractors that a subcontractor's bid is a firm offer if it is used in making a general contractor's prime bid. *See* Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952); *see also* Barnett & Becker, *Beyond Reliance*, *supra* note 11, at 459-60.

188. Craswell, *Default Rules*, *supra* note 51, at 508.

Thus, as with the promise theories, Barnett's proposed default rule is overbroad. Foreseeable reliance cannot alone signify an intention to be legally bound because most promises induce foreseeable reliance. A promisor who intended to keep an unenforceable promise would also be expected to "stand silently by" as the promisee relied on performance so long as he expected to perform the promise. Without a rule that is overbroad, such as that every commercial promise is per se enforceable unless a contrary manifestation appears, Barnett cannot apply his consent theory to a non-bargain promise without some additional marker of enforceability.

C. Judicial Refusal to Enforce Commercial Promises on the Basis of Promise or Consent Theories

To the extent that one can discern a trend in contemporary judicial decisions, it is distinctly contrary to enforcement of the type of commercial promises that the promise and consent theorists contend should be enforceable. For example, in *Mass Cash Register v. Comtrex Systems Corp.*¹⁸⁹ during the course of negotiations, the defendant, an equipment manufacturer, induced the plaintiff, an equipment distributor, to disclose a trade secret: the identity of a national account.¹⁹⁰ The defendant induced the disclosure by promising to share the marketing of the account with the plaintiff. It later breached its promise by selling to the account directly. The court found, however, that the plaintiff would have lost the account anyway because the buyer was dissatisfied with the equipment the plaintiff had been supplying and the plaintiff had no other source of supply.¹⁹¹ The court denied the plaintiff's claim for promissory estoppel on grounds that the plaintiff's reliance led to no actual financial loss.¹⁹²

The manufacturer's promise of confidentiality would be enforceable under the standards of both the promise and consent theorists because it was seriously made in the course of business negotiations, the promisee's reliance (disclosure) was specifically requested, and the reliance benefitted the promisor. The court's imposition of the additional Section 90

189. 901 F. Supp. 404 (D. Mass. 1995).

190. *Id.* at 412.

191. *Id.* at 420.

192. *Id.* The court apparently did not consider whether the plaintiff lost whatever it might have been able to obtain from the defendant as consideration for disclosing the account. See E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1388-89 (1985) (referring to such losses as the cost of modification).

requirement that the promisee suffer a reliance loss is inconsistent with both consent and promise theories.¹⁹³

Neither promise nor consent theory can explain the denial of enforcement if the promisee's reliance is the performance of a pre-existing legal duty, as was the case in *Thanksgiving Tower Partners v. Anros Thanksgiving Partners*.¹⁹⁴ In a dispute arising from a complex real-estate transaction, one of the buyers claimed that it had established a \$5 million letter of credit in the seller's favor only after the seller promised not to draw on it. When the seller did draw on the letter and sued the buyer for breach, the buyer filed a counterclaim alleging that the seller's promise was binding under Section 90. The court held that the necessary reliance element was not met because the buyer was contractually obligated to establish the credit for the seller's benefit at the time of the alleged promise.

The precise doctrinal grounds of this decision are unclear. Perhaps it rests on the theory that performance of a pre-existing legal duty cannot be consideration for a new promise,¹⁹⁵ perhaps on the theory that the promise was not the cause-in-fact of the injury caused by reliance.¹⁹⁶ In either case, however, whether based on bargain theory or tort, the holding conflicts with the proposition that a serious, non-bargain promise made in furtherance of commercial activity is sufficient for liability under Section 90 whenever the promisee's action is beneficial to the promisor.

Nor can promise or consent theory explain cases that require the promisee to demonstrate that she had a real alternative to the alleged detrimental reliance. In *Moore v. Ford Motor Co.*,¹⁹⁷ Moore sought to enforce an oral promise that he would be granted a Ford distributorship, alleging that he relied on Ford's promise by forgoing an opportunity to obtain a Pontiac distributorship that was offered to him while the discussions with Ford were taking place. In reversing summary judgment for the defendant and remanding the case for trial, the court noted that, in order to establish a claim for promissory estoppel, Moore would have to prove (1) that a Pontiac dealership was available, (2) that Moore would have met Pontiac's dealer qualifications, and (3) that Pontiac would have made him a firm offer.¹⁹⁸

193. This case could have instead been decided on the ground that, while the promise was enforceable, the breach of the promise did not cause harm to the plaintiff.

194. 64 F.3d 227 (5th Cir. 1995).

195. SECOND RESTATEMENT, *supra* note 1, § 73.

196. RESTATEMENT (SECOND) OF THE LAW OF TORTS, § 546 (1977) [hereinafter RESTATEMENT (SECOND) TORTS].

197. 901 F. Supp. 1293 (N.D. Ill. 1995).

198. *Id.* at 1301.

As with the pre-existing duty rule, the existence of an alternative to the promisee's reliance action is logically necessary to prove that the promise was a but-for cause of the reliance and the ensuing loss. But if Section 90 promises were binding because of promise or consent, the promisee's available alternatives would be irrelevant to their enforceability.¹⁹⁹

Finally, neither promise nor consent theory can explain why promissory estoppel is denied if, before actual reliance occurs, the promise is withdrawn or the promisor disputes his obligation.²⁰⁰ Both theories claim that a contractual obligation arises at the moment the commercial promise is made or consent to be legally bound is manifested. As a contract, this obligation should be unaffected by a subsequent, unilateral repudiation by the promisor, as is the case with bargain promises.²⁰¹ But plaintiffs routinely lose Section 90 claims if their reliance takes place after the promise is withdrawn or disavowed.²⁰² These cases undermine any argument that Section 90 is a mode of unilateral contract formation, arising solely from a promise made in appropriate circumstances.²⁰³

199. See Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 159 & n.334. It could be argued that the existence of an alternative is necessary not for proof of Section 90 liability but for proof of damages caused by the breach of an enforceable Section 90 promise. But if expectation damages are the usual measure of Section 90 liability, then the existence of alternatives to reliance is irrelevant to the damage causation issue.

200. See cases cited *supra* note 128, paras. (4)-(5) (cases in which the reliance element was not satisfied because the promise was withdrawn before reliance occurred, and cases in which the reliance element was not satisfied because the promisor indicated that it would not perform before reliance occurred).

201. See SECOND RESTATEMENT, *supra* note 1, § 253 (repudiation is breach of contract); U.C.C. § 2-610 (1995). Barnett's consent theory does not address the effect of a promisor's unilateral repudiation of a promise before reliance can occur. It may be that his natural law analogy of contract to property conveyance would lead him to conclude that the conveyance of an entitlement to performance should be as irrevocable as is the conveyance of title to property.

202. See cases cited *supra* note 128, paras. (4)-(5).

203. Although none of them adopts the analogy, the withdrawn-promise cases suggest that the promise is a form of offer and the reliance a form of acceptance necessary to create the contract. Withdrawal of the "offer" before "acceptance" terminates the offeree's power to create a contract under traditional contract formation doctrine. This interpretation does not, of course, rescue the death of reliance thesis, which posits that no response by the promisee is necessary to make the promise enforceable. It also conflicts with the position taken in the Restatement that agreement (a manifestation of mutual assent) of the parties is not necessary to the formation of a contract under Section 90. See SECOND RESTATEMENT, *supra* note 1, § 3 cmts. a, e; *id.* § 17 cmt. e.

D. The Role of Reliance

For different reasons, both the promise and the consent theories would eliminate the reliance element of Section 90 by arguing that a serious, non-bargain commercial promise is the equivalent of a bargain contract: it should be immediately enforceable to the extent of the promisee's expectation interest without regard to the promisee's reliance or other expression of assent. Under both theories, the courts' continuing requirement of actual reliance for Section 90 liability is illogical and unnecessary.

This attack on the reliance requirement is puzzling because it is not logically necessary to either the promise or consent theories of Section 90. Neither theory specifies the precise content, express or implied, of the promise that the law will enforce. Thus, for example, under Barnett's analysis a person who manifests an intention to be legally bound to perform a promise might also expressly or implicitly condition the promisee's power to enforce the promise on her actual reliance, or might expressly or implicitly reserve a power to rescind the promise at any time before such reliance. In such a case, the reliance condition would define the scope of the promise, but would not affect its legal enforceability. Yet, both promise and consent theorists argue that a reliance requirement in Section 90 is inconsistent with their normative claims.

The court's continuing insistence on reliance can be explained both practically and theoretically. As a practical matter, the most obvious explanation is that courts are following the rule laid down in Section 90 without reference to its rationale. Most courts are inclined to treat Restatement sections as they would statutes, once they have been adopted for that jurisdiction. Those courts who do pause to reflect on the rule doubtless are influenced by its popular name: "Estoppel" has always turned on the reliance induced by the defendant's behavior.

Promise and consent theorists have also rationalized judicial insistence on the reliance requirement on process grounds: actual substantial reliance supplies some evidence of both the promise and the foreseeability of the reliance.²⁰⁴ It may also be that the demand for particularized reliance in the employment cases is based on skepticism about the alleged promise and a desire to keep the case away from a jury. Likewise, a finding that a legally sophisticated promisee could not reasonably or foreseeably have relied on an alleged oral assurance might be a judicial euphemism for doubts about the plaintiff's credibility. But if this were the case, one would expect at least some judges to be more

204. See Yorio & Thel, *The Promissory Basis of Section 90*, *supra* note 11, at 159-63.

candid about their views. Instead, the bench is unanimous in its demand for actual reliance.

To judges uncomfortable with Section 90, reliance might also be seen to supply the two traditional elements of bargain contract that Section 90 promises would otherwise lack: consideration and mutual assent.²⁰⁵ Because all commercial promises are presumably made to induce reliance, the promisee's reliance can often be seen as the product of an implicit bargain, a reaction that is consciously sought by the promisor in making the promise and consciously "given" by the promisee in respect of the promise.²⁰⁶ Thus, reliance fulfills the formal and substantive functions of consideration in a bargained-for exchange.²⁰⁷ Conversely, reliance supplies the element of mutual assent if one sees the reliance-inducing promise as a form of unilateral contract offer that the promisee can accept by reliance.²⁰⁸ This analysis neatly fits the "withdrawn promise" cases discussed above. Yet it also prompts the difficult question whether the promisee can deliberately rely in order to create a binding obligation, in the way that a unilateral contract offeree may tender performance in order to do so.²⁰⁹ Outside the classic unilateral contract offer context, I have found no case holding or suggesting that a promisee may rely in order to create a binding obligation or that such reliance would be either reasonable or foreseeable.

Courts may consider that holding a promisor to a non-bargain promise in the absence of promisee reliance would often be unfair because of the absence of reciprocity or mutuality that reliance would otherwise supply. For example, under the rule that employs Section 90 to prevent subcontractors from withdrawing bids that have been relied upon by prime contractors in making their bids, courts uniformly deny enforcement if the prime contractor engages in "bid-shopping" or "bid-chopping" after being awarded the prime contract and before accepting

205. See SECOND RESTATEMENT, *supra* note 1, § 90 cmt. a (consideration is not necessary for enforcement under Section 90). The Restatement also confirms that agreement (a manifestation of mutual assent) of the parties is not necessary to the formation of a contract under Section 90. See *id.* § 3 cmts. a, e; *id.* § 17 cmt. e.

206. See Barnett & Becker, *Beyond Reliance*, *supra* note 11, at 455-57.

207. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799-802, 806-07, 810-15 (1941) (explaining that, as a legal formality, consideration fulfills evidentiary, cautionary, and channeling functions; it also supplies the substantive basis for contract liability in protecting autonomy and promisee reliance and preventing unjust enrichment).

208. Several commentators have analogized the Section 90 promise to an offer to enter a contract. See, e.g., Pham, *Waning*, *supra* note 2, at 1287-88. Few, however, have analogized the reliance to an acceptance.

209. See SECOND RESTATEMENT, *supra* note 1, § 45.

the subcontractor's bid.²¹⁰ If the promise or consent theory were valid and the subcontractor's bid were a firm offer regardless of reliance, then it should make no difference that the prime contractor seeks to obtain better terms from other contractors before accepting the offer. Yet the injustice of holding the subcontractor to the bid while permitting the prime contractor to shop around for better terms has led courts to release the subcontractor under such circumstances.²¹¹ In effect, these decisions refuse to infer an implied promise to keep the subcontractor's bid open for any longer and to any greater degree than is necessary to protect the actual reliance of the prime contractor.

In contrast to the formalism of promise and consent theories, a promisor-choice theory of contract can rationalize the courts' continuing demand for actual reliance. A requirement of actual reliance on a non-bargain promise does not interfere seriously with a promisor's election to use enforceability to induce beneficial reliance. If the promisor's sole purpose in making the promise enforceable is to induce promisee reliance, and if the promisor disavows the promise before the promisee relies on it, then non-enforcement does not frustrate the functions of enforcement. If legal rules permit the promisor to revoke enforceable promises before the promisee relies, the risk (and cost) of promising will be reduced at no cost to the promisee. A condition of revocability before reliance occurs does not undermine the utility of enforceability in inducing beneficial reliance so long as a promisee's actual reliance is fully protected when it does occur.

But while it is true that a promisee's foreseeable reliance is a necessary condition to enforcement under Section 90, not all reliance is considered equal to this purpose. As the next section will argue, many contemporary courts require the promisee to demonstrate enforcement reliance, an act or forbearance based on a reasonable belief that the promise is legally enforceable. These decisions thus vindicate a major premise of promise and consent theory—that liability should require the promisor's manifested intention to incur legal liability. Contrary to the expansive predictions of some of those theorists, however, the judicial

210. See, e.g., *Lahr Constr. Corp. v. J. Kozel & Son*, 640 N.Y.S.2d 957 (N.Y. Super. Ct. 1996). If reliance is found, such offers would be enforceable under SECOND RESTATEMENT, *supra* note 1, § 87(2), which is comparable to Section 90.

211. See 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 2.31, at 292 (Joseph M. Perillo ed., rev. ed. 1993); see also *Preload Technology, Inc. v. A.B.&J. Constr. Co.*, 696 F.2d 1080, 1089 (5th Cir. 1983); *Debron Corp. v. National Homes Constr. Corp.*, 493 F.2d 352, 358 (8th Cir. 1974); *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958); *Haselden-Langley Constructors v. D.E. Farr & Assocs.*, 676 P.2d 709 (Colo. Ct. App. 1983); *Lahr Constr. Corp. v. J. Kozel & Son*, 640 N.Y.S.2d 957 (N.Y. Super. Ct. 1996).

adoption of this principle serves to restrict rather than to enlarge liability under Section 90, erecting a barrier not mentioned in the text of the rule.

IV. THE GROWING JUDICIAL INSISTENCE ON ENFORCEMENT RELIANCE IN THE COMMERCIAL CONTEXT

It now seems apparent that legal doctrine in the courts is evolving in sympathetic response to the aversion of commercial actors toward the risk of estoppel liability. Many of the opinions reported in 1995 and 1996 lend support to the thesis that, in order to prevail on a promissory estoppel claim, a commercial promisee must now demonstrate not only that her reliance was reasonable in light of the likelihood that the promisor would perform, but also that she had a reasonable belief that the promise was legally enforceable when made. Excluding those promises that are already enforceable under bargain contract theory, this requires that the promisor manifest an affirmative intention that the promise be enforceable at the time of the promise. As the promise and consent theorists insist, the ensuing reliance is reasonable because the promise is enforceable, not vice versa.

Although the promisor's manifestation of intention to be bound is critical to these cases, the court's focus is usually on the promisee's actual or presumed understanding of that manifestation. Enforcement is denied if the court finds that the promisee was or should have been aware that the promise was not intended to create an enforceable obligation. In the following three situation-types, the promisee's actual or presumed legal awareness proves fatal to her ability to enforce a reliance-inducing commercial promise.

A. Enforcement Reliance Prevented by the Presumption of At-Will Employment in Employee Claims of Wrongful Termination

One of the most well-established examples of the requirement of enforcement reliance is in the refusal to apply promissory estoppel to enforce equivocal promises of non-terminable employment made by employers to employees. Over half of all the cases in the sample involved claims of wrongful termination from employment. These employees contended that they were not at-will employees and that their termination violated either an oral promise of permanent employment or a promised discharge procedure. Almost all of these claims failed, usually on a motion for summary judgment. The primary reason for the lack of success is that courts require such employees to demonstrate not that they reasonably relied on the likelihood that the employer would perform its promise, but instead that they had reasonable grounds to believe that the promises constituted a legally enforceable modification of

their at-will status. This requirement often took the form of a demand that the employee prove a sufficiently "clear and definite," or "unambiguous," promise of permanent employment to alter their presumptive at-will status.²¹²

It may be instructive to sample the sorts of statements that courts have found to be inadequate to this task, especially in light of Farber and Matheson's claims about the value of trust in the employment relationship. Employees have been held to have had no right to rely on language such as the following²¹³ as a promise of permanent employment: "Don't worry about being fired";²¹⁴ "You will be here until you retire";²¹⁵ "I have no intention of firing you";²¹⁶ "You will not have to be concerned about job security because you have a job here as long as you want or until you retire";²¹⁷ "You will have continued and secure employment";²¹⁸ "You will have a job until you retire; we'll have you for the next twelve years";²¹⁹ "Your position will never be taken away and you can have it as long as you want it";²²⁰ "You have

212. At other times, the employee was barred because he could not establish an expectation of enforcement because the employer had disclaimed any intention of creating an enforceable obligation. These cases will be discussed *infra* Part IV.B.

213. Some of these cases pre-date the survey years of 1995 and 1996, but were cited by cases in the survey.

214. *Gregory v. Interface Flooring Sys.*, No. 93-4261, 1995 U.S. App. LEXIS 36182, at *20 (6th Cir. Sept. 8, 1995) (not a clear and unambiguous promise of non-termination under Ohio law).

215. *Snyder v. AG Trucking*, 57 F.3d 484, 489 (6th Cir. 1995) (promise not sufficiently specific).

216. *Marmar v. Saloom Furniture Co.*, 130 Lab. Cas. (CCH) ¶ 58,008 (E.D. Pa. Sept. 12, 1995) (employees assured that employer had no intention of firing them and that they were all part of employer's five-year plan received no "absolute guarantee" of job security).

217. *Redgate v. Fairfield Univ.*, 862 F. Supp. 724, 730-31 (D. Conn. 1994) (a promise that the employee could have the job "for as long as you want" did not amount to a clear and definite promise under Connecticut law). *Contra* *Brusilovsky v. Figgie Int'l*, No. 94 C 1506, 1995 U.S. Dist. LEXIS 7341, at *11 (N.D. Ill. May 25, 1995); *Lamaster v. Chicago & Northeast Ill. Dist. Council of Carpenters Apprentice & Trainee Program*, 766 F. Supp. 1497, 1505-06 (N.D. Ill. 1991) (promise, though not clear and definite enough for contract formation, was sufficiently unambiguous for promissory estoppel purposes); *see also* *Howard v. Kuehnert*, No. 95-APE09-1197, 1996 Ohio App. LEXIS 1323, at *7 (Ohio Ct. App. Mar. 28, 1996) (affirming jury verdict for plaintiff on promissory estoppel grounds where employer dissuaded at-will employee from seeking employment elsewhere by assurances of job security).

218. *Treadwell v. John Hancock Mut. Life Ins. Co.*, 666 F. Supp. 278 (D. Mass. 1987) (misrepresentation claim, statement too vague and general).

219. *Wolf v. Buss (Am.) Inc.*, No. 94 C 902, 1995 U.S. Dist. LEXIS 1544, at *17 (N.D. Ill. Feb. 7, 1995).

220. *Barbuto v. William Backus Hosp.*, No. 105452, 1995 Conn. Super. LEXIS 1184, at *2, *15-16 (Conn. Super. Ct. Apr. 13, 1995) (language did not manifest

full-time, permanent employment”;²²¹ “I don’t see a problem with you working until you are sixty-five”;²²² “You will retire from this company”;²²³ “You will be the first person to work here for fifty years”;²²⁴ “You will never have to worry about your job”;²²⁵ “Should I look for another job?” “No, your job is secure”;²²⁶ “The only person that can eliminate you is yourself; you have a permanent job.”²²⁷

Such assurances instill employee loyalty and commitment to the job.²²⁸ Thus, these would appear to be precisely the situations referred to by Farber and Matheson in their arguments that the appropriate role of Section 90 is in preserving business relationships involving trust and long term commitment.²²⁹ And just as obviously, the courts refuse to enforce these promises, reiterating with monotonous regularity that reliance on such employer assurances is “unreasonable” and “unforeseeable” in view of the prevailing at-will employment assumptions. In other words, employers give oral assurances seeking to induce reliance, employees predictably rely, and courts dutifully hold the reliance to be unforeseeable.

If the courts in these decisions were referring to performance reliance—the employee’s reliance on a belief that the employer would do what he said he would do—then their conclusions would seem insupportable. Even though a strong presumption favors employment at-

defendant’s intention to undertake a contractual commitment to plaintiff).

221. *Hutchison v. Cleveland Clinic Found.*, No. 68521, 1995 Ohio App. LEXIS 4329, at *4 (Ohio Ct. App. Sept. 28, 1995).

222. *McCullough v. Avon Lake McDonald’s*, No. 95CA006066, 1995 Ohio App. LEXIS 3529, at *5 (Ohio Ct. App. Aug. 16, 1995).

223. *Enlow v. Empire-Detroit Steel Div., Cyclops Corp.*, No. 94-CA-80, 1995 Ohio App. LEXIS 3628, at *5-6 (Ohio Ct. App. Aug. 1, 1995).

224. *Healey v. Republic Powdered Metals*, 619 N.E.2d 1035, 1036 (Ohio Ct. App. 1992) (statement was just speculation about the future).

225. *Clipson v. Schlessman*, 624 N.E.2d 220, 222, 233 (Ohio Ct. App. 1993) (statement was not a promise, just a discussion about employee’s future).

226. *Corradi v. Soclof*, No. 67586, 1995 Ohio App. LEXIS 2162, at *9, *14-16 (Ohio Ct. App. May 25, 1995) (affirming summary judgment for defendant, the statement was not a clear and unambiguous promise of continued employment for a specific period). *Contra Robeson v. Midwest Ford, Inc.*, No. 94-3405, 1995 U.S. App. LEXIS 24641, at *1 (6th Cir. Aug. 17, 1995) (affirming jury verdict for plaintiff; in persuading plaintiff to decline a competitor’s offer of employment, employer assured plaintiff that he would be employed “as long as they were there”).

227. *Wilder v. Butler Mfg. Co.*, 533 N.E.2d 1129, 1130 (Ill. App. Ct. 1989).

228. It is, incidentally, improbable that the employee/plaintiffs in these cases are falsifying the evidence: perjurers would allege more legally efficacious promises.

229. *Farber & Matheson, Invisible Handshake*, *supra* note 11, at 925-29. These cases would also seem to fit the requirements of Professor Kostritsky: the parties are enmeshed in a relationship; they possess different knowledge and status; and the reliance benefits the promisor. *See Kostritsky, A New Theory*, *supra* note 11.

will in most jurisdictions,²³⁰ it is difficult to maintain, as the opinions do, that these statements are not "clear and definite" or "unambiguous."²³¹ Expressions that are far less explicit than these statements have been held sufficient to create bargain contracts under the objective theory of contract formation.²³²

Nor is it plausible that all of these employers were merely making general policy noises or speculations about the employees' future rather than promises. In some cases, no doubt, the employers were simply giving reassurances designed to make the employees feel appreciated and secure. These statements may not have been intended to induce any specific reliance. In other cases, however, the employers both intended, and were accurately understood, to be making a commitment to their employees, who were expected to rely upon it. If this seems unpersuasive, return to that litany of assurances and try the effect of inserting such statements as "remember that your employment is at-will and I can fire you at any time" or "don't rely on anything I am telling you." The resulting dissonance shows that these qualifications are wholly inconsistent with the assurances given. Yet the opinions cited hold that employees *should have heard* these unspoken qualifications when the assurances were given.

Finally, it is particularly unpersuasive to hold that reliance in such cases is literally unforeseeable. And if the courts were speaking of pure

230. Judge Posner, in the context of a non-employee claim for promissory estoppel, acknowledged this animus:

Employment at will (i.e., without a contract of employment) remains the dominant type of employment relationship in this country, and would be seriously undermined if employees could use the doctrine of promissory estoppel to make alleged oral contracts of employment enforceable. Reliance is easily, perhaps too easily, shown in the employment setting. Agreeing to work for a particular employer, thereby giving up alternative opportunities for employment, can easily be described as reliance on the employer's alleged oral promises concerning the terms of employment.

Goldstick v. ICM Realty, 788 F.2d 456, 465 (7th Cir. 1986); *accord* Milazzo v. O'Connell, 925 F. Supp. 1331, 1340 (N.D. Ill. 1996) ("In Illinois oral contracts for employment are viewed more skeptically than written contracts . . .").

231. This position was forcefully stated by the dissent in *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268 (Mich. 1991) (Levin, J., dissenting).

232. In the context of a bargain, courts are much more liberal in interpreting the parties' statements as assent to be contractually bound. *E.g.*, *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777, 779 (Mo. Ct. App. 1907) (holding as a matter of law that employer's statement "[g]o ahead, you're all right[, g]et your men out, and don't let that worry you" constituted acceptance of employee's offer to renew his annual employment agreement) (quoting McKittrick); *see also* Tiersma, *Language of Offer and Acceptance*, *supra* note 25, at 189 (applying Gricean maxim of relevance to the offeree's statement makes it interpretable only as an acceptance of the offer).

performance reliance, then their opinions seem incorrect. But it is not the performance reliance that the courts are finding to be unforeseeable: it is the reliance on having a legal claim or remedy that is deemed unreasonable and unforeseeable in light of the circumstances of the statements.²³³ As is implied by Okun's observations, courts are, in effect, permitting employers to say "I unenforceably-promise not to terminate you." The inference is that such non-binding commitments have some value in the workplace that would be lost if employers could make no commitment at all, which might result if all such promises were legally enforceable.²³⁴ The employment cases thus imply that Section 90 is being interpreted to protect only enforcement reliance, leaving non-legal sanctions to protect performance reliance.

B. Enforcement Reliance Prevented by Disclaimers of Promissory Liability

While a strong judicial presumption of unenforceability can prevent enforcement reliance, a more direct way to affect the promisee's awareness of non-enforceability is for the promisor to make an explicit disclaimer of liability for any oral promises he may make, either at the time of the disclaimer or afterward. An explicit disclaimer of liability has become the conventional defense to Section 90 liability for institutional promisors, "repeat players" such as employers, franchisors,²³⁵ lending institutions, and buyers and sellers of businesses.²³⁶ Most courts have

233. Thus, in *Latimore-Debose v. BVM Inc.*, No. 69439, 1996 Ohio App. LEXIS 1425, at *7 (Ohio Ct. App. Apr. 4, 1996), the court, in denying a claim for promissory estoppel based on an employee handbook that stated that it did not create a contract, noted that the employee could not have reasonably relied on terms that were neither contractual nor binding. The reliance that the court is referring to here is obviously enforcement reliance rather than performance reliance.

234. Goetz & Scott, *Enforcing Promises*, *supra* note 16 (noting that a cost of enforcement of non-bargain promises is that risk-averse potential promisors will make fewer of them, leading to a loss of the utility of beneficial reliance).

235. *Adiel v. Coca-Cola Bottling Co.*, No. 95 Civ. 0725 (WK), 1995 U.S. Dist. LEXIS 13141 (S.D.N.Y. Sept. 11, 1995) (express contractual power to terminate in distributorship agreement prevented reasonable reliance on distributor's subsequent oral promise not to terminate); *Nichols Motorcycle Supply v. Dunlop Tire Corp.*, 913 F. Supp. 1088 (N.D. Ill. 1995) (oral promise not to terminate distributor superseded by written distributorship agreement permitting termination).

236. One set of commercial promisors that appears to remain subject to Section 90 (or more precisely, Section 87(2)) consists of subcontractors who submit bids for use in a general contractor's bid. But such subcontractors can avoid liability by expressly providing that their contract can be withdrawn at any time. *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958). If they do not include such a disclaimer in their bids, therefore, it may be because they view their liability under Section 90 as intended.

given full effect to such disclaimers, whether they precede or follow the promise.²³⁷ These holdings are premised on an assumption of full and continuous awareness by the promisee of the legal effect of the disclaimer.

For example, while negotiating for the acquisition of a corporation, the parties in *W.R. Grace & Co. v. Taco-Tico Acquisition Corp.*,²³⁸ executed a "non-binding letter of intent" setting forth some of the proposed terms and providing, among other things, that no party would be under any legal obligation until a written contract was executed, notwithstanding any "past, present or future" written or oral statements.²³⁹ Pending agreement, the buyer undertook to manage the properties at a nominal fee, alleging that it relied on the seller's subsequent oral assurances that the acquisition would be completed. When the deal fell through, the buyer sued on a theory of promissory estoppel. Reversing a jury verdict for the buyer, the Georgia Court of Appeals held that, as a matter of law, the buyer could not rely on any promise made by the seller after the buyer had signed the letter agreement.²⁴⁰ The court emphasized that both parties were "experienced, successful businessmen who were advised by capable

237. *But see* *Shelley v. Trafalgar House Pub. Ltd. Co.*, 918 F. Supp. 515, 522-23 (D.P.R. 1996) (although joint venture agreement stated that it was not binding and did not create a contract, venturer's promise created obligation to bargain in good faith enforceable under the doctrine of promissory estoppel).

238. 454 S.E.2d 789 (Ga. Ct. App. 1995).

239. *Id.* at 790. The provision in question is a masterpiece of prophylactic drafting:

"Notwithstanding the foregoing . . . or any other past, present or future written or oral indications of assent or indications of results of negotiation or agreement to some or all matters then under negotiation, it is agreed that no party to the proposed transaction (and no person or entity related to any such party) will be under any legal obligation with respect to the proposed transaction or any similar transaction, and no offer, commitment, estoppel, undertaking or obligation of any nature whatsoever shall be implied in fact, law or equity, unless and until a formal agreement providing for the transaction containing in detailed legal form terms, conditions, representations and warranties (secured by an appropriate escrow) has been executed and delivered by all parties intended to be bound. This paragraph sets forth the entire understanding and agreement of the parties (and all related persons and entities) with regard to the subject matter of this paragraph and supersedes all prior and contemporaneous agreements, arrangements and understandings related thereto. This paragraph may be amended, modified, superseded or cancelled only by a written instrument which specifically states that it amends this paragraph, executed by an authorized officer of each entity to be bound thereby."

Id. at 790 (quoting letter of intent) (omission by court).

240. *Id.* at 791.

attorneys²⁴¹ and who must be deemed to have understood the letter. The literal effect of the disclaimer was thus to insulate the seller from liability for any promises or factual representations²⁴² that it might thereafter make during the course of the negotiation. By preventing enforcement reliance on any other promise, such a provision forecloses any but the formal contract route to legal liability.²⁴³

Similarly, in *Puri v. Blockbuster Music Retail*²⁴⁴ during negotiations over a commercial lease, the potential lessee's attorney told the lessor that the lease terms had been approved and that he considered the lease agreement to be fully executed and enforceable.²⁴⁵ He instructed the lessor to begin constructing improvements on the leased premises and the lessor complied. The proposed written lease that the parties had been exchanging, however, provided that it was not to be effective until executed by all parties and that agents had no power to bind the parties.²⁴⁶ After the lessor had incurred construction expense in complying with the attorney's request, the lessee terminated negotiations and denied any liability on the lease. The lessor sued under Section 90, seeking recovery of the expense. The court held that the execution proviso prevented any estoppel from arising because it rendered the lessor's reliance on the subsequent oral statement unreasonable as a matter of law.²⁴⁷ The lessor's reliance was thus held to be

241. *Id.*

242. *See also* *Banque Franco-Hellenic de Commerce Int'l et Maritime v. Christophides*, 905 F. Supp. 182 (S.D.N.Y. 1995) (enforcing a written disclaimer of liability for fraudulent misrepresentations in a lender liability lawsuit), *vacated*, 106 F.3d 22 (2d Cir. 1997).

243. It is noteworthy that the provision in question in *W.R. Grace* failed to keep the issue from the jury despite its admirable comprehensiveness.

244. No. 95 C 50018, 1995 U.S. Dist. LEXIS 18819 (N.D. Ill. Dec. 20, 1995).

245. *Id.* at *5.

246. The relevant lease provision provided:

"ARTICLE 56[.] PRELIMINARY NEGOTIATIONS[.] The submission of this lease form by Tenant for examination does not constitute an offer to lease or a reservation of an option to lease. In addition, Landlord and Tenant acknowledge that neither of them shall be bound by the representations, promises or preliminary negotiations with respect to the Demised Premises made by their respective employees or agents. It is their intention that neither party be legally bound in any way until this Lease has been fully executed by both Landlord and Tenant."

Id. at *3 (quoting lease). These terms were confirmed by the cover letter sent by the tenant's agent. *Id.* at *3-4.

247. *Id.*

"unforeseeable" by the promisor, *even though the promisor expressly requested that reliance*.²⁴⁸

If the reliance referred to by the *Puri* court was performance reliance, then its conclusion would be untenable. The lessor's reliance was requested, so surely it was foreseeable. And whether it was reasonable to rely on the likelihood that the prospective tenant would perform its promise cannot be a question of law because it depends on the factual basis of the expectation that the lessee would in fact honor its attorney's promise. Only if the court is referring to enforcement reliance does *Puri* make sense. The lessor could not reasonably believe that it had received an enforceable promise without some basis for believing that the agreed execution proviso had been nullified.

The decisions occasionally allude to the difference between enforcement reliance and performance reliance. In *Rennick v. O.P.T.I.O.N. Care, Inc.*,²⁴⁹ the plaintiffs failed to establish a Section 90 claim of a promise to issue a franchise because the letter of intent on which the claim was based specifically stated that it did not create a binding obligation. The plaintiffs argued that they had relied on oral promises preceding the letter and on the defendant's handshake as assurance that the franchise would be issued. The Ninth Circuit held that the reliance was unreasonable in light of the express language of the letter of intent:

In light of the unequivocal nonbinding language in the letter of intent, reliance on the existence of a contract was unreasonable as a matter of law. The July 3 meeting and the letter of intent might have made [the plaintiffs'] actions prudent as a matter of business judgment, in contemplation of a probable contract, but they could not control whether the reliance would be reasonable for purposes of binding O.P.T.I.O.N. to a contract to which it expressly had as yet refused to agree [sic].²⁵⁰

The performance reliance may have been "prudent as a matter of business judgment" even though the statements and the handshake did not create grounds for enforcement reliance. The court seems to acknowledge that there is a place for performance reliance upon the unenforceable commercial promise or assurance.

248. Cf. *Farash v. Sykes Datatronics*, 452 N.E.2d 1245 (N.Y. 1983) (holding that landlord may recover in quantum meruit for the cost of alterations made pursuant to an oral lease, though a claim for breach of lease is barred by the Statute of Frauds).

249. 77 F.3d 309 (9th Cir.), *cert. denied*, 117 S. Ct. 174 (1996).

250. *Id.* at 317.

In employment law, the employee handbook has evolved from being a possible source of contractual rights²⁵¹ to being a barrier to their assertion. Disclaimers in handbooks or separate documents signed by the employees are now widely used by employers to bar claims of non-terminable, or continued, employment.²⁵² Though employees are rarely “experienced, successful businessmen represented by capable attorneys,” these written at-will agreements and handbook disclaimers usually prevent employers’ subsequent, oral promises of job security from giving rise to liability under Section 90.²⁵³ Once the disclaimer is made, the employer can make reliance-inducing, unenforceable promises.

C. Enforcement Reliance Prevented by the Promisee’s Knowledge of Legal Rules Concerning Enforceability

Even in cases in which the promisor does not expressly disclaim an intention to be legally bound, a promisee may be unreasonable in relying on its legal enforceability. Many courts will find enforcement reliance unforeseeable in the absence of an affirmative manifestation of intention

251. See Richard Harrison Winters, Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196 (1985) (analysis of employee handbooks as unilateral contracts); see also *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980); *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150 (Ohio 1985).

252. A typical example of a disclaimer signed at the time of employment and of a handbook disclaimer can be found in *Loghry v. Unicolor Corp.*, 927 P.2d 706, 709 (Wyo. 1996). The disclaimer provided as follows:

“In consideration of my employment, I agree to conform to the rules and regulations of the Company and that my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or me. I understand that no employee, manager, or other agent of the Company other than the President of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing. Any amendment to the foregoing must be in writing and signed by the President.”

Id. (quoting employment application disclaimer). The handbook provided:

“The language used in this handbook is not intended to create, nor is it to be construed to constitute, a contract between the Company and any one or all of its employees. You have been hired as an at will employee, and just as you may voluntarily leave at any time, your employment and compensation may be terminated, with or without cause, and with or without notice, at any time by the Company in its sole discretion. There are no promises, express or implied, for continued employment, and no one except the Board of Directors of the Company is authorized to waive or modify these conditions of employment.”

Id. (quoting employment handbook).

253. See *supra* note 109.

to be legally bound, even when the promisor deliberately induces reliance. For example, in *Rhode Island Hospital Trust National Bank v. Varadian*,²⁵⁴ the counterclaimants in an action on a promissory note claimed the plaintiff bank breached an oral contract to lend an additional \$43.5 million for a construction project. In answer to special interrogatories, the jury found that (1) the counterclaimants knew the bank intended to be bound only by an agreement in writing for the construction loan, but also (2) the bank did make the oral loan promise intending to induce reliance by the counterclaimants, and (3) they reasonably relied on the promise by executing the note and guarantee on which the bank had sued.²⁵⁵ Following a jury verdict in the counterclaimants' favor, the trial court entered judgment against the counterclaimants on their contract claim but in their favor on their promissory estoppel claim.

The Supreme Judicial Court of Massachusetts reversed the promissory estoppel judgment on the grounds that, given the finding that the counterclaimants understood the bank's intention not to be legally bound, they could not have understood the bank's statement to have been a "promise," in the sense of a commitment.²⁵⁶ It also concluded that any reliance by the counterclaimants, experienced businessmen, on such a non-contractual "promise" would be unreasonable and unforeseeable as a matter of law.²⁵⁷

If one interprets Section 90 to protect what I have called performance reliance, then the court begged the essential question. Given findings 2 and 3 (intent to induce reliance and actual reliance), it follows that the jury was wrong as a matter of law in finding 1 (no intent to be legally bound). If all parties were aware of Section 90 at the time of the oral promise, then the promisor's intention to be legally bound under the doctrine of promissory estoppel was manifested by its intentional inducement of the promisees' reliance. *Varadian*, however, rests on the principle that Section 90 cannot establish contract liability unless the promisor manifests an intention to be legally bound *by some means other than by intentionally making a reliance-inducing promise*.

Varadian contradicts the traditional, performance reliance protection version of Section 90. The text of Section 90 does not require that the

254. 647 N.E.2d 1174 (Mass. 1995).

255. *Id.* at 1175-76.

256. *Id.* at 1179. Relying on earlier precedent, the court explained, "[a] promise made with an understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract." *Id.* (quoting *Kuzmeskus v. Pickup Motor Co.*, 115 N.E.2d 461, 463 (Mass. 1953)) (alteration in original).

257. *Id.*; see also *Pacesetter Motors v. Nissan Motor Corp.*, 913 F. Supp. 174, 183 (W.D.N.Y. 1996) (reliance on oral financing commitment unreasonable where plaintiffs were experienced businessmen).

promisor manifest an intention to be legally bound; the only intention that Section 90 seems to require of the promisor is the intention that the promise induce the promisee to rely on the promise.²⁵⁸ Yet the jury in *Varadian* found that the promisor had this intention and that the promisee did so rely. The *Varadian* court, however, defined “promise” for Section 90 purposes as a statement that both parties reasonably understand as a commitment to be legally bound, a narrower definition than that contained in the Restatement.²⁵⁹ *Varadian* suggests that Section 90 enforcement will be limited to those cases in which the promisor expressly states an intention to be legally bound by the promise.²⁶⁰

The promisees in *Varadian* had reason to believe that the bank did not intend to make a legally binding commitment based on their dealings with the bank. Some courts find the “fatal knowledge” that bars enforcement reliance in the commercial promisee’s general familiarity with business practice of formalizing serious agreements. A commercial promisor’s failure to formalize even a serious, reliance-inducing promise may defeat the promisee’s effort to establish enforcement reliance. Thus, in *Thatcher’s Drug Store of West Goshen v. Consolidated Supermarkets*,²⁶¹ a drug store owner was considering whether to relocate its business or to renew a commercial lease in a space adjacent to that leased by a supermarket. The lease agreement did not restrict the supermarket from entering the pharmacy business and the drug store was concerned about the possibility that the supermarket would begin competing in the retail drug business. Before renewing the lease, the drug store owner obtained an oral assurance from the supermarket owner that it had no intention of operating a competing pharmacy at that location. Soon after the drug store had renewed its lease, however, the

258. See Slawson, *Role of Reliance*, *supra* note 75, at 208-09 (criticizing Barnett’s consent theory for confusing intention to be legally bound with intention that the promisee rely on the promise, which Slawson contends, correctly in my view, is the relevant intention for Section 90 purposes). Slawson’s argument is consistent with the Restatement, which takes the position that liability under Section 90 does not depend on mutual assent. See *supra* note 203.

259. SECOND RESTATEMENT, *supra* note 1, § 2(1) (“A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”); *Id.* § 2 cmt. a (word “promise” is not limited to contracts).

260. Even in these cases, a court might deny enforcement if it concludes, as did the court in *Varadian*, that the legally sophisticated promisee should recognize the promise as unenforceable. If so, Section 90 cannot be deliberately used in contract formation. See, e.g., *Triax Pac., Inc. v. American Ins. Co.*, No. 94-4091, 1995 U.S. App. LEXIS 31097, at *19-21 (10th Cir. Nov. 2, 1995) (unenforceable commercial promise that induced reliance).

261. 636 A.2d 156 (Pa. 1994).

supermarket began preparing to operate a pharmacy. Reversing a trial court order enjoining the competitor, the Pennsylvania Supreme Court held that the drug store's reliance on the assurance was unreasonable as a matter of law, and that enforcement of the promise was therefore not necessary to avoid injustice. The court explained:

In view of the relationship between the parties and the nature and duration of the promise, any agreement not to compete should have been formalized. Proceeding in such a manner would have memorialized the occasion and reduced the possibility that the terms of the agreement would be misunderstood. As a business entity operating in the commercial setting, Thatcher's showed poor judgment when it decided to renew its ten-year lease and forgo its opportunity to relocate on the basis of an indefinitely worded promise uttered in an informal conversation with a potential competitor.²⁶²

The court also found that enforcement of such oral promises would not advance the evidentiary, cautionary, and deterrent functions normally served by a writing.²⁶³ *Thatcher's* seems to signal a judicial refusal to enforce serious commercial promises in the absence of contract formalities on the basis that prudent, experienced businesspeople normally do not rely on such promises in conducting their affairs.

Enforcement reliance becomes especially difficult to demonstrate in cases involving promisees who are attorneys and others who are aware of the rules of formal contract formation. Several courts in the sample held that even expressly requested reliance was legally unforeseeable if the promisee's education or experience made her aware that the accompanying promise was otherwise unenforceable as a bargain contract.²⁶⁴ For example, in *Harkinson v. Trammell Crow Co.*,²⁶⁵ a

262. *Id.* at 160-61.

263. *Id.* at 161.

264. *Shawmut Bank Conn., N.A. v. L & R Realty Co.*, Nos. 523134, 522814, 1995 Conn. Super. LEXIS 1853 (Conn. Super. Ct. June 20, 1995) (attorney's reliance on oral promise that he would have advised a client to get in writing was unreasonable; promise to subordinate mortgage conflicted with written contract); *State v. Law Offices of Donald W. Belveal*, 663 So. 2d 650 (Fla. Dist. Ct. App. 1995) (attorney had no right to rely on a state official's oral promise to renew a contract with the state that contained no right to renew); *Edmondson v. Zetusky*, 674 A.2d 760, 765 (Pa. Commw. Ct. 1996) (employee could not as a matter of law justifiably rely on a promise that the public official had no statutory right to make); *Harkinson v. Trammell Crow Co.*, 915 S.W.2d 28 (Tex. Ct. App. 1995) (real estate broker could not recover under Section 90 on oral broker's contract because he should have known that it did not comply with the requirement that such agreements be in writing); *Brah v. Bence*, 532 N.W.2d 145 (Wis. Ct. App. 1995)

real estate broker was denied recovery under quantum meruit principles for breach of an oral listing agreement. In denying recovery under Section 90, the court held that, as a result of licensing procedures, the broker was charged with knowledge of the regulatory statute requiring all brokerage contracts to be in writing, and that reliance on a payment promise in the face of such legal knowledge was unreasonable as a matter of law.²⁶⁶

This ruling would be difficult to justify if Section 90 protected performance reliance. The broker might well have had adequate reason to believe in the likelihood that the customer would perform. In that sense, the reliance was not "unreasonable" as described by the court. What was unreasonable was the broker's expectation of a legal remedy in the event of breach. One can infer that no assurance by the seller short of compliance with the statute's requirements would have satisfied the court's reading of Section 90. Other decisions impute knowledge of relevant statutes of frauds to parties who are found to have been legally represented, with the result that reliance on oral promises is found to be insufficient under Section 90.²⁶⁷ These cases too seem to exclude the possibility that the parties might reasonably believe the promise to be enforceable solely under the principles of Section 90.

The trend toward enforcement reliance is not universal. Some courts have enforced promises under Section 90 that legally aware promisees would have known were unenforceable under contract law principles.²⁶⁸

(broker could not recover on oral promise to extend written real estate contract because broker was familiar with the requirement that such agreements be in writing). *But see* *Lo Bosco v. Kure Eng'g*, 891 F. Supp. 1020 (D.N.J. 1995) (plaintiff attorney definitely and substantially relied on oral promise of employment by surrendering old job, and reliance was not unreasonable because of attorney's sophistication).

265. 915 S.W.2d 28 (Tex. Ct. App. 1995), *aff'd in part*, 944 S.W.2d 631 (Tex. 1997) (finding that the doctrine of promissory estoppel did not provide an exception to the Real Estate License Act's requirement of written commission agreement).

266. *See id.*; *accord* *Brah v. Bence*, 532 N.W.2d 145 (Wis. Ct. App. 1995).

267. *E.g.*, *Ceres Ill., Inc. v. Illinois Scrap Processing*, 500 N.E.2d 1, 7 (Ill. 1986) (refusing to enforce a 15-year oral lease under Section 90, despite landlord's active encouragement of tenant's significant reliance and occupancy, because the parties were sophisticated businesspeople who should have known that the lease would not be enforceable unless in writing). In the case of less sophisticated parties, this rule may be relaxed, however. *See, e.g.*, *Michael K. Sutley, P.A. v. Selchow*, No. C9-95-860, 1996 Minn. App. LEXIS 4 (Minn. Ct. App. Jan. 2, 1996) (plaintiff reasonably relied on defendant's promise to reduce oral agreement to writing and to sign it, estopping defendant from pleading statute of frauds).

268. *E.g.*, *Cameron Manor, Inc. v. Department of Pub. Welfare*, 681 A.2d 836 (Pa. Commw. Ct. 1996) (health services provider that was decertified and ineligible for state reimbursement for services could recover under a theory of equitable estoppel where it had provided services at the state's request and on assurance that it would be

For example, courts have enforced promises under Section 90 in situations in which the original contract was unenforceable because of failure to agree on essential terms.²⁶⁹ In *Neiss v. Ehlers*, discussed above in Part III.A, the parties entered into a written agreement that plaintiff would work as an optometrist in defendant's practice for a year, after which plaintiff would be entitled to purchase stock in the defendant's professional corporation on terms to be agreed upon later. When the agreement failed, the court permitted plaintiff to sue for reliance damages incurred in beginning business operations under the agreement. *Neiss* follows a long line of classic Section 90 cases that protect reliance on commercial agreements that sophisticated promisees would have realized were unenforceable as contracts.²⁷⁰ But *Neiss* is not necessarily inconsistent with the enforcement reliance requirement if the assumptions about the parties' legal awareness are relaxed. The formalized written agreement that created the parties' relationship may have been seen by the court as an attempt to create a legal obligation. If so, then the failure to specify the terms of the ultimate exchange so as to justify an award of expectation damages did not prevent the court from awarding a reliance-based remedy. Had the parties to the original agreement foreseen the possibility of failing to agree, they might well have agreed to such a remedy.

A second case that appears not to hold a commercial promisee to a high standard of legal awareness is *Cyberchron Corp. v. Calldata Systems Development*.²⁷¹ Pending negotiations for the purchase of computer components, the purchaser urged the manufacturer to begin work in developing the product. When the negotiations ultimately failed because the parties could not agree on material terms of the contract, the manufacturer sued to recover the expense incurred in reliance on the buyer's request. Both the trial and appellate courts agreed that the manufacturer had no claim for breach of contract because the parties

reimbursed).

269. *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983); *Vigoda v. Denver Urban Renewal Auth.*, 646 P.2d 900, 905 (Colo. 1982); *Hoffman v. Red Owl Stores*, 133 N.W.2d 267, 274-75 (Wis. 1965); *see also* Henderson, *Promissory Estoppel*, *supra* note 2, at 361 ("Section 90 is also being used as a basis for enforcement of promises which under traditional theory would be held indefinite and hence unenforceable."). *Contra* *Keil v. Glacier Park, Inc.*, 614 P.2d 502, 506-07 (Mont. 1980); *Lohse v. Atlantic Richfield Co.*, 389 N.W.2d 352, 357 (N.D. 1986).

270. *See* *Neiss v. Ehlers*, 899 P.2d 700 (Or. Ct. App. 1995); *see also* *Beal Corp. Liquidating Trust v. Valleylab, Inc.*, 927 F. Supp. 1350 (D. Colo. 1996); *Smith v. Horsehead Indus.*, Nos. 90 Civ. 6993 (SAS), 90 Civ. 7006 (SAS), 1995 U.S. Dist. LEXIS 9549 (S.D.N.Y. July 6, 1995); *Whccler v. White*, 398 S.W.2d 93 (Tex. 1965); *Hoffman v. Red Owl Stores*, 133 N.W.2d 267 (Wis. 1965).

271. 47 F.3d 39 (2d Cir. 1995).

never agreed on essential terms concerning price and because it would have been unreasonable to rely on the documents that the parties had exchanged as establishing an enforceable agreement.²⁷² The appellate court, however, affirmed a judgment for the plaintiff, granting reliance expenses under the doctrine of promissory estoppel even though the purchaser had refused to put its commitment in writing.²⁷³ The court based its ruling on the fact that the purchaser had repeatedly told the manufacturer to proceed, insisting that the manufacturer was contractually obligated to do so and assuring it that the negotiation problem would be resolved.²⁷⁴ The buyer's reference to the seller's obligation to perform and its assurance of the execution of the agreement show that *Cyberchron* is consistent with the idea that the promisor must manifest some intention that its promise be legally enforceable.

D. Section 90 as Catch-22

"Is Orr crazy?"

"He sure is," Doc Daneeka said.

"Can you ground him?"

"I sure can. But first he has to ask me to. That's part of the rule."

"Then why doesn't he ask you to?"

"Because he's crazy," Doc Daneeka said. "He has to be crazy to keep flying combat missions after all the close calls he's had. Sure, I can ground Orr. But first he has to ask me to."

"That's all he has to do to be grounded?"

"That's all. Let him ask me."

"And then you can ground him?" Yossarian asked.

"No. Then I can't ground him."

"You mean there's a catch?"

"Sure there's a catch," Doc Daneeka replied. "Catch-22. Anyone who wants to get out of combat duty isn't really crazy."

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer

272. *Id.* at 43. The provision in the purchase order providing for reimbursement of seller's expense was subject to unilateral deletion by the buyer. The court held that the purchase order never became binding by its terms, and that even if it had, reliance on this provision would have been unreasonable. *Id.*

273. *Id.* at 44.

274. *Id.* at 44-45.

be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

"That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.²⁷⁵

The strongest argument against the new requirement of enforcement reliance is that it may become the Catch-22 of Section 90. The legally sophisticated commercial actor who receives a non-bargain, commercial promise would find herself more or less in Orr's situation. If she is sufficiently aware of Section 90 to rely on the enforceability of the promise, then she must also be aware of the consideration doctrine and the statute of frauds and so must know that the promise is unenforceable. If so, she cannot reasonably or foreseeably rely on its enforceability and enforcement would not be necessary to avoid injustice. Conversely, if she has a well-founded reason to believe that the promise is enforceable as a bargain promise, so that she could demonstrate foreseeable enforcement reliance under Section 90, then she has no need of Section 90 to "prevent injustice" because she will have a valid claim for breach of contract. (*Pause for respectful whistle.*)

One way out of the dilemma is to interpret Section 90 solely to protect promisees who are mistaken about whether the promise is enforceable, a role that might have made sense in the family promise context.²⁷⁶ But applying this doctrine in a commercial context is highly problematic. Which mistakes should the court protect? Which misconceptions about law are "reasonable" or "foreseeable?" Why should this doctrine protect ill-informed commercial promisees and not ill-informed promisors? Using Section 90 to correct mistakes of law by commercial promisees would introduce a spectacular degree of uncertainty into commercial communications with no obvious gain in utility.

The only way that Section 90 can avoid becoming Catch-22 is by judicial recognition of a new mode of creating enforceable, non-bargain promises. If Section 90 is used to enforce only those promises that the promisee reasonably expects to be enforceable, then the promisee's expectation of enforceability must somehow arise both outside the rules of bargain contract and from some basis other than the simple fact that the

275. JOSEPH HELLER, *CATCH-22*, at 45-46 (Random House 1961).

276. See Randy Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 431 (1993); Barnett & Becker, *Beyond Reliance*, *supra* note 11, at 463-66.

promise has induced performance reliance. The leading candidate for such a role has already been suggested by Barnett's consent theory: an expression by the promisor that the promise is intended to be legally enforceable. A non-bargain promise accompanied by such an expression and followed by reliance would justify enforcement. The promisee's expectation of enforcement (not just performance) would be produced by the expression of the promisor, not by application of other rules of contract formation or by Section 90 itself.

The parties expressed an intention that a non-bargain promise be binding in *Kysor Industrial Corp. v. Margaux, Inc.*²⁷⁷ During negotiations over the proposed sale of Margaux, the parties executed a letter of intent expressing their understanding that Kysor would make an offer for Margaux. The letter contained a "no-shop" agreement intended to encourage Kysor to incur the expense of a due diligence review of Margaux before making a firm offer.²⁷⁸ This agreement required Margaux to pay Kysor its due diligence expenses plus a "termination fee" of \$300,000 if Margaux negotiated with any other buyer within a four month period or if it failed to approve the transaction after Kysor made its offer.²⁷⁹ The agreement also stated that except for the no-shop and termination fee promises, it was not intended to create any binding obligations.²⁸⁰

277. 674 A.2d 889 (Del. Super. Ct. 1996).

278. The no-shop provision was as follows:
"CERTAIN UNDERTAKINGS[.]

1. For a period of 120 days from the date of this letter, Margaux shall not, directly or indirectly, solicit or entertain offers from, negotiate with or in any manner encourage, discuss, accept or otherwise consider any proposal of any person other than Kysor to acquire capital stock of Margaux, or any of its assets or business, in whole or in part, regardless of the form of transaction (other than sales of inventory in the ordinary course)."

Id. at 892 (quoting letter of intent).

279. The provisions stated:

"2. In the event that Margaux breaches its undertakings under the foregoing paragraph of this section, if the Board of Directors of Margaux fails to approve the contemplated transactions or withdraws its approval, or if the transactions are not approved by Margaux's stockholders, Margaux shall promptly: (a) reimburse Kysor for all expenses incurred in connection with the transaction, including without limitation, its due diligence expenses and the fees and expenses of its professional advisors, and (b) pay as liquidated damages to Kysor a termination fee equal to Three Hundred Thousand Dollars (\$300,000)."

Id. at 892-93 (quoting letter of intent).

280. The provisions continued:

"The purpose of this letter is to state our present intentions with respect to the proposed transaction. *Except for the provisions set forth under the heading 'Certain Undertakings' above (as to which provisions this letter constitutes our*

Margaux breached by selling to a third party during the four month period and Kysor sued to recover its expenses and the termination fee, arguing both breach of contract and promissory estoppel. Margaux argued that its promises were not supported by consideration, because the letter of intent did not obligate Kysor in any way. The court, incorrectly in my opinion, found that the letter of intent was a "unilateral contract" that became binding when Kysor began its due diligence inquiry.²⁸¹ It thus did not reach the promissory estoppel issue.

Kysor might better have been based on a finding that the defendant expressed an intention to be bound to a non-bargain commercial promise that induced reliance on its enforceability. By stating that its payment obligations were binding, Margaux induced Kysor to give enforcement reliance rather than mere performance reliance on its no-shop promise. In contrast to the promisor in *Varadian*, Margaux deliberately chose the higher level of obligation afforded by enforceability and the court properly respected that choice.

It is also likely that commercial parties express an intention to be bound in certain cases in which their non-bargain promises are formalized or are modifications to an existing, already binding contract.²⁸²

The problem, of course, with such a rule is as always the problem of interpretation. Something more than making a performance reliance-inducing promise must count as an expression of an intention to be legally bound. Some courts claim to find enforcement reliance without clearly explaining how the expectation of enforceability arose. In *Omega Engineering v. Eastman Kodak Co.*,²⁸³ Omega sued Eastman for discontinuing a line of batteries that Omega had been purchasing for use in its products. Omega claimed that Eastman had made oral commitments to continue to supply Omega's requirements of the batteries. Although the court held that the alleged promises were unenforceable as contracts

agreement), this letter does not constitute a legally binding agreement between us or obligate either of us with respect to the proposed transaction and no such agreement or obligation shall exist unless and until we execute a mutually acceptable definitive purchase agreement."

Id. at 893 (quoting letter of intent) (emphasis added).

281. The letter of intent is not an offer for a unilateral contract that can be accepted by Kysor's performance of an action (the due diligence review) as the court found because the agreement does not condition Margaux's duty to pay on Kysor's actual performance of any investigation. Kysor might instead have argued that the termination fee agreement is implicitly an offer for a unilateral contract of the unusual form "if you will make an offer in a given amount, I will promise either to accept it or to pay \$300,000." The court did not rest its decision on this reading, however.

282. See Barnett & Becker, *Beyond Reliance*, *supra* note 11, at 460-63.

283. 908 F. Supp. 1084 (D. Conn. 1995).

because of failure to satisfy the Article 2 Statute of Frauds,²⁸⁴ it refused to grant defendant summary judgment on the promissory estoppel claim, reasoning that the alleged promises “‘manifested a present intention . . . to undertake immediate contractual obligations’”²⁸⁵ While the court did not address the reasonableness of Omega’s reliance on oral promises it should have known were unenforceable as contracts, the opinion implies that knowledge of unenforceability as a bargain contract does not bar a claim under Section 90.²⁸⁶ Had it emphasized the parties’ legal sophistication, it might have concluded that the promisor did not manifest an intention to undertake contractual obligations because of its failure to sign a written contract.

V. CONCLUSION: THE TINY FUTURE OF PROMISSORY ESTOPPEL

Promissory estoppel has not even unsettled “classical” bargain contract theory, much less led to its death. Instead, in the more general struggle between contract and tort law, formal contract is proving to be the more robust competitor. Sophisticated commercial promisors—employers, banks, franchisors, insurers, and other businesspeople—have learned how to avoid the risk of Section 90 liability. Having invoked the disclaimer shield, they become free to induce performance reliance by making unenforceable promises. Essential to their success has been a growing judicial consensus that Section 90 liability, unlike tort liability, must be deliberately incurred; that the promisor must not only make a promise but must also manifest an intention to be legally bound by the promise; that the promisee must not only have a reasonable expectation of performance but must also have an expectation of legal enforceability arising from some source outside Section 90 before her reliance will be protected under Section 90; and that it is not unjust to deny enforcement to a commercial promisee who relied without a reasonable expectation of a legal remedy for breach.

The rule of presumptive liability for commercial promises proposed by the dominant legal theories would impose needless transaction costs. The ubiquity of deliberate, formalized strategies to avoid Section 90

284. *Id.* at 1090-91.

285. *Id.* at 1092 (quoting *D’Ulisse-Cupo v. Board of Directors of Notre Dame High Sch.*, 520 A.2d 217, 221-22 (Conn. 1987)). Courts in other jurisdictions have held that promissory estoppel cannot enforce an oral contract falling within the Article 2 statute of frauds, U.C.C. § 2-201, on the basis that the statute’s specific enumeration of reliance-based exceptions precludes the use of estoppel to create others. *E.g.*, *Lige Dickson Co. v. Union Oil Co.*, 635 P.2d 103 (Wash. 1981).

286. *Omega Eng’g v. Eastman Kodak Co.*, 908 F. Supp. 1084, 1096 (D. Conn. 1995).

demonstrates that well-advised, repeat players will contract around the risk. Thus, the problem is one of selecting a default rule for purposes of deciding about the enforceability of promises lacking either an assurance of enforceability or a disclaimer of it. Given the interest of all commercial parties in making and recognizing enforceable promises, one would expect that our legal system would have provided more useful channeling resources. Roman law recognized contracts created by a specific verbal formula, which satisfied the *causa* requirement that we later came to call consideration. Negotiating for a legally binding contract, the promisee would ask "*Spondesne . . . ?*" [Do you promise?] to which the promisor would respond "*Spondeo . . .*" [I promise], each phrase being followed by a description of the promised performance.²⁸⁷ These sentences being uttered, the contract became a legally binding obligation.²⁸⁸

In the "heaven of legal concepts," commercial actors would not simply "promise": they would "enforceably-promise" or "unenforceably-promise," *spondeo* or *non-spondeo*, promisees would rely accordingly, and contract law could be taught in one semester. In the absence of new verb-forms, it would seem that the courts are imposing a default rule of interpretation favoring "unenforceably-promise" on claims arising under Section 90. That approach has the merit of according with what appears to be the most common intention of commercial promisors. If courts were to adopt expressly the rule that commercial promises must be accompanied by a statement of intention to be bound in order to be enforceable under Section 90, they could more candidly acknowledge the existence of performance reliance. They could stop referring to promisee performance reliance as unreasonable or unforeseeable—it is neither—and could say more accurately that it is no justification for legal enforcement.

287. See J.A.C. THOMAS, THE INSTITUTES OF JUSTINIAN: TEXT, TRANSLATION AND COMMENTARY 207-08 (1975); J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 217 (1976); P. VAN WARMELO, AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CIVIL LAW 148, 161-62 (1976).

288. On the movement from formalism to natural law in the Roman system, see POUND, PHILOSOPHY OF LAW, *supra* note 161, at 139-40.